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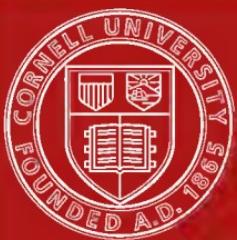
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The liability of municipal corporations



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THE LIABILITY
OF
MUNICIPAL CORPORATIONS
FOR TORT

THE LIABILITY
OF
MUNICIPAL CORPORATIONS
FOR TORT

*TREATING FULLY MUNICIPAL LIABILITY
FOR NEGLIGENCE*

BY
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AUTHOR OF "STATUTORY TORTS IN MASSACHUSETTS"

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THE LIABILITY OF MUNICIPAL CORPORATIONS FOR TORT.

CHAPTER I.

THE GENERAL PRINCIPLES OF THE LIABILITY.

§ 1. The Possibilities of the Subject. — The impossibility of framing any general proposition which will include all the torts for which public corporations have been held responsible in a private action at common law appears to be conceded by both judges and text writers.¹ Although this may be so, it is, nevertheless, quite possible to point out the rules that govern the liability for tort of such corporations in each class of cases, together with the general principles of law upon which they rest, since for the most part they have become clear and well settled. In getting at those rules and principles, three considerations are of primary importance. They are briefly: First, the character of the corporate body that is sought to be charged with liability for the tort; Second, the nature of the duty from the breach of which the tort resulted; Third, the means at the command of the corporation for the performance of that duty.

§ 2. The Character of the Corporation. — In the United States two classes of public corporations, commonly known

¹ See *Conway v. Beaumont*, 61 Tex. 10, 12 (1884); Dillon, Municipal Corporations, 4th ed., § 948.

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to the law as quasi corporations and municipal corporations proper, each of which is, in certain important particulars, distinct in character from the other, have long been recognized by all courts, and have furnished the subject for much legal discussion. It has happened, therefore, that the distinctions between them have been frequently pointed out, and have now for the most part become clear and well settled.¹

It is universally agreed that all those subdivisions of state territory, such as counties, townships, school districts, and like bodies,² which are created by the legislature for public purposes and without regard to the wishes of their inhabitants, are to be included in the class known as quasi corporations. They are in essence local branches of the state government, though clothed with a corporate form in order that they may the better perform the duties imposed upon them. Generally they comprise large areas of territory which are but sparsely settled, and the relations of life and business existing within them are extremely simple.³

Municipal corporations proper, on the other hand, comprise all those portions of territory, such as cities, boroughs, and villages, which have been incorporated at the request of, or with the assent of, their inhabitants, by special charter, or have been voluntarily organized under general laws. They are not simply local branches of the state government, as are all quasi corporations, but are given a much wider range, and greater variety, of powers and duties. It is also to be observed that the public bodies

¹ *Hamilton County v. Mighels*, 7 Oh. St. 109 (1857), and cases cited *post*.

² In this category New England towns are also commonly included.

³ *El Paso County v. Bish*, 18 Col. 474 (1893), (33 Pac. Rep. 184); *White v. Commissioners of Chowan*, 90 N. C. 437 (1884), and cases cited on page 4, note 2.

of this class are usually characterized by the fact that they are confined within comparatively small and compact limits, that they are thickly settled, and that the relations of life and business within them have a far greater degree of complexity.¹

The chief lines of differentiation between these two classes of public corporations, it will be noticed, lie in the presence or absence of the element of consent to their creation; in the breadth or narrowness of the powers and duties given to them; in the complexity or simplicity of the relations of life existing within them.

§ 3. Quasi Corporations.—Quasi corporations are territorial and political sections of the state, created by the sovereign power without reference to the wish of the inhabitants and solely for public and governmental purposes. They are simply the agencies or auxiliaries that the state has established for the purpose of aiding in the general administration of the state government. Thus, though given a corporate form, the sole object and reason of their creation is that the state may through them the more conveniently and effectively discharge those duties which as an organized government it owes to all its citizens in respect to matters local in character and requiring local supervision and control. It is through them in large measure that the powers of the state government reach and operate upon the people. It follows, therefore, that all the powers with which quasi corporations are intrusted are powers of the state, and all the duties with the performance of which they are charged are duties of the state.² Being then simply governmental instrumentalities

¹ See *Galveston v. Posnainsky*, 62 Tex. 118 (1884); *Barnes v. District of Columbia*, 91 U. S. 540 (1875), and cases cited in § 4.

² See *Galveston v. Posnainsky*, 62 Tex. 118 (1884); *White v. Commissioners of Chowan*, 90 N. C. 437 (1884); *Eikenberry v. Township*

ties, charged with the performance of governmental duties and with nothing more, the rule that sovereignty is not amenable to the suit of a private individual for neglect in the discharge of public duties is extended to them, and by an almost unanimity of decision¹ the courts hold that quasi corporations are not liable for negligence or misfeasance in the performance of the duties thrust upon them, unless such liability is expressly created by statute.²

of Bazaar, 22 Kan. 556, 560 (1879); *Madden v. Lancaster County*, 65 Fed. Rep. 188 (1894).

¹ This rule, however, is not quite universal. In three states a narrow line of cases which depart from this rule may be found. Thus in Iowa it has become the settled doctrine that counties are responsible at common law for the safe condition of county bridges. *Wilson v. Jefferson County*, 13 Ia. 181 (1862); *Brown v. Jefferson County*, 16 Ia. 339 (1864); *McCullom v. Black Hawk County*, 21 Ia. 409 (1866); *Soper v. Henry County*, 26 Ia. 264 (1868); *Taylor v. Davis County*, 40 Ia. 295 (1875); *Krause v. Davis County*, 44 Ia. 141 (1876); *Ferguson v. Davis County*, 57 Ia. 601 (1881), (10 N. W. Rep. 906); *Huff v. Poweshiek County*, 60 Ia. 529 (1883), (15 N. W. Rep. 418). This same narrow rule prevails also in Pennsylvania. *Humphreys v. Armstrong County*, 56 Pa. St. 204 (1868); *Rigony v. Schuylkill County*, 103 Pa. St. 382 (1883). And formerly prevailed in Indiana. *House v. Board of Commissioners*, 60 Ind. 580 (1878); *Board of Commissioners v. Pritchett*, 85 Ind. 68 (1882); *Board of Commissioners v. Deprez*, 87 Ind. 509 (1882); *Board of Commissioners v. Brown*, 89 Ind. 48 (1883); *Board of Commissioners v. Legg*, 93 Ind. 523 (1883); *Board of Commissioners v. Emmerson*, 95 Ind. 579 (1884); *Board of Commissioners v. Bacon*, 96 Ind. 31 (1884); *Patton v. Board of Commissioners*, 96 Ind. 131 (1884); *Vaught v. Board of Commissioners*, 101 Ind. 123 (1884). This doctrine was reviewed, and the above line of Indiana cases overruled, in *Jasper County v. Allman*, 142 Ind. 573 (1895), (42 N. E. Rep. 206). In Maryland counties are held liable for injuries resulting from defects in the highway. *Anne Arundel County v. Duckett*, 20 Md. 468 (1863); *Calvert County v. Gibson*, 36 Md. 229 (1872); *Baltimore County v. Baker*, 44 Md. 1 (1875); *Eyler v. Allegany County*, 49 Md. 257 (1878).

² *Alabama*. *Covington County v. Kinney*, 45 Ala. 176 (1871); *Barbour County v. Horn*, 48 Ala. 566 (1872); *Sims v. Butler County*, 49 Ala. 110 (1873); *Askew v. Hale County*, 54 Ala. 639

A quasi corporation may, however, by its own voluntary act, become something more than the mere governmental

(1875); *Lee County v. Yarbrough*, 85 Ala. 590 (1888), (5 So. Rep. 341).

Arkansas. *Granger v. Pulaski County*, 26 Ark. 37 (1870).

California. *Huffman v. San Joaquin County*, 21 Cal. 426 (1863); *Sherbourne v. Yuba County*, 21 Cal. 113 (1862); *Crowell v. Sonoma County*, 25 Cal. 313 (1864); *Barnett v. Contra Costa County*, 67 Cal. 77 (1885), (7 Pac. Rep. 177).

Colorado. *El Paso County v. Bish*, 18 Col. 474 (1893), (33 Pac. Rep. 184).

Connecticut. *Ward v. Hartford County*, 12 Conn. 404 (1838); *Chidsey v. Canton*, 17 Conn. 475 (1846).

Delaware. *Carter v. Wilds*, 8 Houst. 14 (1887), (31 Atl. Rep. 715).

Georgia. *Haygood v. Justices of the Inferior Court*, 20 Ga. 845 (1856); *Scales v. Chattahoochee County*, 41 Ga. 225 (1870).

Idaho. *Davis v. Ada County*, 47 Pac. Rep. 93 (1896).

Illinois. *Hedges v. Madison County*, 6 Ill. 567 (1844); *White v. Bond County*, 58 Ill. 297 (1871); *Symonds v. Clay County*, 71 Ill. 355 (1874); *Hollenbeck v. Winnebago County*, 95 Ill. 148 (1880).

Indiana. *Fulton County v. Rickel*, 106 Ind. 501 (1886), (7 N. E. Rep. 220); *Abbett v. Johnson County*, 114 Ind. 61 (1887), (16 N. E. Rep. 127); *Carroll County v. Bailey*, 122 Ind. 46 (1889), (23 N. E. Rep. 672); *Smith v. Allen County*, 131 Ind. 116 (1891), (30 N. E. Rep. 942); *Cones v. Benton County*, 137 Ind. 404 (1893), (37 N. E. Rep. 272); *Jasper County v. Allman*, 142 Ind. 573 (1895), (42 N. E. Rep. 206); *Johnson County v. Hemphill*, 14 Ind. App. 219 (1895), (42 N. E. Rep. 760); *Montgomery County v. Coffenberry*, 14 Ind. App. 701 (1895), (42 N. E. Rep. 491); *Johnson County v. Reinier*, 18 Ind. App. 119 (1897), (47 N. E. Rep. 642).

Iowa. *Soper v. Henry County*, 26 Ia. 264 (1868); *Kincaid v. Hardin County*, 53 Ia. 430 (1880), (5 N. W. Rep. 589).

Kansas. *Eikenberry v. Township of Bazaar*, 22 Kan. 556 (1879); *Marion County v. Riggs*, 24 Kan. 255 (1880).

Kentucky. *Downing v. Mason County*, 87 Ky. 208 (1888), (8 S. W. Rep. 264).

Louisiana. *King v. Police Jury*, 12 La. An. 858 (1857); *Fischer Land, etc. Co. v. Bordelon*, 52 La. An. 429 (1899), (27 So. Rep. 59).

Maine. *Small v. Danville*, 51 Me. 359 (1864); *Brown v. Vinalhaven*, 65 Me. 402 (1876).

Maryland. *Anne Arundel County v. Duvall*, 54 Md. 350 (1880).

Massachusetts. *Mower v. Leicester*, 9 Mass. 247 (1812); *Hill v. Boston*, 122 Mass. 344 (1877).

Michigan. *Commissioners of Highways v. Martin*, 4 Mich. 557

instrumentality that the state originally made it and intended it to be, and may thus assume a new character.

(1857); *Larkin v. Saginaw County*, 11 Mich. 88 (1862); *Webster v. Hillsdale County*, 99 Mich. 259 (1894), (58 N. W. Rep. 317).

Minnesota. *Dosdall v. County of Olmsted*, 30 Minn. 96 (1882), (14 N. W. Rep. 458).

Mississippi. *Sutton v. Board of Police* 41 Miss. 236 (1866); *Brabham v. Hinds County*, 54 Miss. 363 (1877).

Missouri. *Miller v. Iron County*, 29 Mo. 122 (1859); *Reardon v. St. Louis County*, 36 Mo. 555 (1865); *Clark v. Adair County*, 79 Mo. 536 (1883); *Reed v. Howell County*, 125 Mo. 58 (1894), (28 S. W. Rep. 177).

Montana. *Territory v. Cascade County*, 8 Mont. 396 (1889), (20 Pac. Rep. 809).

Nebraska. *Wehn v. Gage County*, 5 Neb. 494 (1877); *Woods v. Colfax County*, 10 Neb. 552 (1880), (7 N. W. Rep. 269).

New Hampshire. *Farnum v. Concord*, 2 N. H. 392 (1821).

New Jersey. *Freeholders of Sussex v. Strader*, 18 N. J. L. 108 (1840); *Cooley v. Freeholders of Essex*, 27 N. J. L. 415 (1859); *Livermore v. Freeholders of Camden*, 29 N. J. L. 245 (1861).

New York. *Bartlett v. Crozier*, 17 Johns. 439 (1820); *Morey v. Newfane*, 8 Barb. 645 (1850); *Albrecht v. Queens County*, 84 Hun, 399 (1895), (32 N. Y. Supp. 473); *Ahern v. Kings County*, 89 Hun, 148 (1895), (34 N. Y. Supp. 1023).

North Carolina. *Kinsey v. Magistrates of Jones*, 8 Jones L. 186 (1860); *White v. Chowan County*, 90 N. C. 437 (1884).

North Dakota. *Vail v. Amenia*, 4 N. Dak. 239 (1894), (59 N. W. Rep. 1092).

Ohio. *Hamilton County v. Mighels*, 7 Oh. St. 109 (1857), overruling *Brown County v. Butt*, 2 Oh. Rep. 348 (1826); *Finch v. Board of Education*, 30 Oh. St. 37 (1876).

Oregon. *Templeton v. Linn County*, 22 Oreg. 313 (1892), (29 Pac. Rep. 795).

Pennsylvania. *Lehigh County v. Hoffort*, 116 Pa. St. 119 (1887), (9 Atl. Rep. 177); *Ford v. Kendall School District*, 121 Pa. St. 543 (1888), (15 Atl. Rep. 812).

South Carolina. *Young v. Commissioners of Roads*, 2 N. & McC. 587 (1820).

South Dakota. *Bailey v. Lawrence County*, 5 S. Dak. 393 (1894), (59 N. W. Rep. 219).

Tennessee. *Wood v. Tipton County*, 7 Baxt. 112 (1874); *White's Creek Turnpike Co. v. Davidson County*, 14 Lea, 73 (1884).

Texas. *Navasota v. Pearce*, 46 Tex. 525 (1877); *Walton v. Travis*

Such a change of character may be brought about, it seems, by the assumption and performance of some special duty undertaken for its own private advantage, which has been either imposed upon it by the legislature with its consent express or implied, or conferred upon it by the legislature at its request,¹ or voluntarily assumed without any action on the part of the legislature.² When a quasi corporation assumes in any one of these ways the performance of duties for its own private advantage, it thereby ceases to be a pure quasi corporation and becomes to that extent a municipal corporation proper. With such a change in character comes also a change in the rule of liability, and such corporation is held to be responsible to the same extent as a municipal corporation proper under like circumstances.³

County, 5 Tex. Civ. App. 525 (1893), (24 S. W. Rep. 352); Floria v. Galveston County, 55 S. W. Rep. 540 (Tex. Civ. App. 1900).

Vermont. Baxter v. Winooski Turnpike Co., 22 Vt. 114, 123 (1849); Hyde v. Jamaica, 27 Vt. 443, 457 (1855).

Virginia. Fry v. County of Albemarle, 86 Va. 195 (1890), (9 S. E. Rep. 1004); Field v. Same, 20 S. E. Rep. 954 (1895).

Washington. Clark v. Lincoln County, 1 Wash. 518 (1889), (20 Pac. Rep. 576).

West Virginia. Watkins v. Preston County Court, 30 W. Va. 657 (1888), (5 S. E. Rep. 654).

Wisconsin. Randles v. Waukesha County, 96 Wis. 629 (1897), (71 N. W. Rep. 1034).

England. Russell v. Men of Devon, 2 Term Rep. 667 (1788).

¹ Mr. Justice Metcalf, speaking of the rule giving immunity from private action to quasi corporations, says: "This rule of law, however, is of limited application. It is applied, in the case of towns, only to the neglect or omission of a town to perform those duties which are imposed on all towns, without their corporate assent, and exclusively for public purposes; and not to the neglect of those obligations which a town incurs, when a special duty is imposed on it, with its consent, express or implied, or a special authority is conferred on it, at its request." Bigelow v. Randolph, 14 Gray (Mass.), 541, 543 (1860).

² Hannon v. St. Louis County, 62 Mo. 313 (1876).

³ Thompson v. Polk County, 38 Minn. 130 (1888), (36 N. W. Rep.

§ 4. **Municipal Corporations Proper.** — Public corporations of this class, created by special charter or voluntarily organized under general laws,¹ have a distinctly dual character. They, like quasi corporations, are governmental instrumentalities, endowed with all those powers and duties necessary for the establishment and maintenance of good government within their territory. While in the exercise of these powers and the discharge of these duties, a municipal corporation proper is simply another of the political divisions of the state, employed by it as a means through which it may perform those duties that it owes to all citizens alike. But this is not the sole object, nor indeed the main object, of their creation. They are incorporated at the wish and special instance of the inhabitants for the advancement of their own private interests. More or less, generally very much more, extensive

267); *Schussler v. Hennepin County*, 67 Minn. 412 (1897), (70 N. W. Rep. 6); *Rowland v. Kalamazoo County*, 49 Mich. 553 (1883), (14 N. W. Rep. 491); *Monltou v. Scarborough*, 71 Me. 267 (1880); *Hand v. Brookline*, 126 Mass. 324 (1879); *Coburn v. San Mateo County*, 75 Fed. Rep. 520, 537 (1896).

In *Haag v. Vanderburgh County*, 60 Ind. 511 (1878), a county was held liable for creating a nuisance.

By the weight of authority a private party can maintain an action against a county to recover damages for the infringement of a patent. This rule appears to rest upon the ground that a patentee's rights and remedies are created and defined by Congress, which has, under the constitution, the exclusive control of the subject, and Congress has not excepted counties from the obligation to respect the patentee's rights. *May v. Logan County*, 30 Fed. Rep. 250, 259 (1887); *May v. Mercer County*, 30 Fed. Rep. 246 (1887); *May v. Buchanan County*, 29 Fed. Rep. 469 (1886); *May v. County of Fond du Lac*, 27 Fed. Rep. 691 (1886). *Contra, Jacobs v. Hamilton County*, 1 Bond, 500 (1861); *May v. Juneau County*, 30 Fed. Rep. 241 (1887).

¹ "The whole municipal authority emanates from the legislature. Its legislative charter indicates its extent and regulates the distribution of its powers as well as the manner of selecting and compensating its agents." Mr. Justice Hunt in *Barnes v. District of Columbia*, 91 U. S. 540, 546 (1875).

powers and privileges, therefore, which are to be exercised for the improvement of the territory within their limits and for its adaptation to the purposes of business and residence, are conferred upon them.

Municipal corporations proper thus represent, on the one hand, the state in the discharge of its public functions, and, on the other hand, their inhabitants in the protection and advancement of their pecuniary and proprietary interests. In brief, they are the resultant of a public corporation and a private corporation blended together.¹

While acting in their governmental capacity, municipal corporations proper are given the benefit of that same rule which is applied to the sovereign power itself, and are afforded complete immunity from civil responsibility for acts done or omitted, unless such responsibility is expressly created by statute.² When, however, they are not acting in the exercise of their purely governmental functions, but are performing duties that pertain to the exercise of those private franchises, powers, and privileges which belong to them for their own corporate benefit, or are dealing with property held by them for their own corporate gain or emolument, then a different rule of liability is applied and they are generally held responsible for injuries arising from their negligent acts or their omissions to the same extent as a private corporation under like circumstances.³

¹ See *Galveston v. Posnainsky*, 62 Tex. 118 (1884); *Western College of Medicine v. Cleveland*, 12 Oh. St. 375 (1861); *Maxmilian v. Mayor, etc. of New York*, 62 N. Y. 160 (1875).

² See *Hewison v. New Haven*, 37 Conn. 475 (1871); *Hill v. Boston*, 122 Mass. 344 (1877); *Bigelow v. Randolph*, 14 Gray (Mass.), 541 (1860); *French v. Boston*, 129 Mass. 592 (1880); *Eastman v. Meredith*, 36 N. H. 284 (1858).

³ *Jones v. New Haven*, 34 Conn. 1 (1867); *Oliver v. Worcester*, 102 Mass. 489 (1869); *Thayer v. Boston*, 19 Pick. (Mass.) 511 (1837); *Pittsburgh v. Grier*, 22 Pa. St. 54 (1858).

In *Jones v. New Haven*, Mr. Justice Carpenter says, at page 14:

§ 5. **The Nature of the Duty.**—As was pointed out in the preceding section, municipal corporations proper have two distinct characters, the one public, the other private. It follows as a natural consequence of this peculiarity that the duties performed by them are, broadly classified, of two kinds. The first is incident to their public character, and comprises all those governmental duties that are imposed upon them as the representatives of the state, duties relating to the public peace, health, safety, and education, and as well duties growing out of the exercise of their legislative and judicial or discretionary powers. The second kind is incident to their private character, and embraces all municipal duties that grow out of the ownership of property for private gain, such as wharves, water and gas works, markets, and like institutions; and those duties that are incident to the actual work of constructing and repairing quasi public works, such as sewers, drains, and the like, which are commonly called executory duties.

The broad, general distinctions between these two kinds of duties are reasonably plain and marked, and have been often pointed out by the courts. Nevertheless there are many duties that occupy a middle ground between the two kinds which it is not easy to classify with certainty. The difficulty in determining clearly and accurately the line of demarcation between the two kinds in

“When a corporation is charged with the performance of some public duty, as a condition express or implied upon which it holds its corporate powers; when a grant is made to a corporation of some special power or privilege at its request, out of which public duties grow; and when some special duty is imposed upon a corporation not belonging to it under the general law, with its consent; in these and like cases, if the corporation is guilty of negligence in the discharge of such duty, thereby causing injury to another, it is liable to an action in favor of the party injured.”

such cases has been the principal difficulty that courts have experienced in considering this branch of the law, and has given rise to much of the confusion to be found in the decisions of the various states. As soon, however, as the class to which the duty, in any particular case, belongs has been accurately determined, it becomes a comparatively simple matter to fix the rights of the parties, since the rules of law that establish the immunities and the liabilities of a municipal corporation while engaged in the performance of their duties are fairly clear and well settled.¹

§ 6. Legislative and Judicial Duties.—Of the numerous duties devolving upon municipal corporations, many, it is obvious, are not absolute in their nature, but are rather intrusted to the judgment and discretion of the municipal authorities. Duties of this character are commonly referred to in the cases as legislative and judicial, or discretionary duties. Under this head are included all those duties that involve deliberation, judgment, and discretion in their exercise, whether the result attained by that ex-

¹ *Bailey v. Mayor, etc. of New York*, 3 Hill (N. Y.), 531 (1842); *Lloyd v. Same*, 5 N. Y. 369 (1851); *Richmond v. Long*, 17 Gratt. (Va.) 375 (1867), and cases cited in notes under §§ 6 and 7, *post*.

Mr. Justice Nelson, in *Bailey v. Mayor, etc. of New York*, 3 Hill (N. Y.), 531, at page 539, speaking of the distinction between powers granted exclusively for public purposes, and those granted for private advantage, says that it is "quite clear and well settled, and the process of separation is practicable. To this end, regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common advantage therefrom, the corporation, *quoad hoc*, is to be regarded as a private company."

ercise is the accomplishment of purposes public and governmental or private and municipal. As to such duties, the corporation is not bound in the first instance to act at all,¹ nor is it, if it proceeds to act, liable for negligence in their performance.²

¹ Nor has a court of chancery any power to compel it to exercise a power left to its legislative or judicial discretion. Thus it has been held that a bill to compel the construction of a sewer for the better drainage of the plaintiff's premises could not be entertained, though the power to construct the sewer had been conferred upon the corporation. *Horton v. Nashville*, 4 Lea (Teun.), 39 (1879).

² *Alabama*. *Davis v. Montgomery*, 51 Ala. 139 (1874); *Campbell v. Montgomery*, 53 Ala. 527, 530 (1875).

Colorado. *Daniels v. Denver*, 2 Col. 669 (1875).

Georgia. *Duke v. Rome*, 20 Ga. 635 (1856); *Rivers v. Augusta*, 65 Ga. 376 (1880).

Illinois. *Goodrich v. Chicago*, 20 Ill. 445 (1858); *Freeport v. Isbell*, 83 Ill. 440 (1876).

Indiana. *Faulkner v. Aurora*, 85 Ind. 130 (1882); *Lafayette v. Timberlake*, 88 Ind. 330 (1882); *Kistner v. Indianapolis*, 100 Ind. 210 (1884); *Anderson v. East*, 117 Ind. 126 (1888), (19 N. E. Rep. 726).

Iowa. *Ogg v. Lansing*, 35 Ia. 495 (1872); *Ball v. Woodbine*, 61 Ia. 83 (1883), (15 N. W. Rep. 846); *Vanhorn v. Des Moines*, 63 Ia. 447 (1884), (19 N. W. Rep. 293).

Kentucky. *James v. Harrodsburg*, 85 Ky. 191 (1887), (3 S. W. Rep. 135).

Louisiana. *Bennett v. New Orleans*, 14 La. An. 120 (1859).

Michigan. *Dewey v. Detroit*, 15 Mich. 307 (1867); *Detroit v. Beckman*, 34 Mich. 125 (1876).

Missouri. *Schattner v. Kansas City*, 53 Mo. 162 (1873); *Armstrong v. Brunswick*, 79 Mo. 319 (1883); *Kiley v. Kansas City*, 87 Mo. 103 (1885).

Nevada. *McDonough v. Virginia City*, 6 Nev. 90 (1870).

New Jersey. *Reock v. Newark*, 33 N. J. L. 129, 132 (1868).

New York. *Wilson v. Mayor, etc. of New York*, 1 Den. 595 (1845); *Levy v. Same*, 1 Sandf. 465 (1848); *Cole v. Medina*, 27 Barb. 218 (1858); *Mills v. Brooklyn*, 32 N. Y. 489 (1865).

North Carolina. *Hill v. Charlotte*, 72 N. C. 55 (1875).

Ohio. *Wheeler v. Cincinnati*, 19 Oh. St. 19 (1869).

Pennsylvania. *Carr v. Northern Liberties*, 35 Pa. St. 324 (1860); *Easton v. Neff*, 102 Pa. St. 474 (1883); *Lehigh County v. Hoffort*, 116

Thus, at common law municipal corporations are not liable to a private individual for a failure to exercise their power to abate private nuisances,¹ nor for a failure to supply sufficient water and apparatus for the protection of property from destruction by fire.² Nor furthermore, if in

Pa. St. 119 (1887), (9 Atl. Rep. 177); *McDade v. Chester*, 117 Pa. St. 414 (1887), (12 Atl. Rep. 421).

South Carolina. *Black v. Columbia*, 19 S. C. 412 (1883).

Tennessee. *Foster v. Lookout Water Co. et al.*, 3 Lea, 42 (1879).

West Virginia. *Mendel v. Wheeling*, 28 W. Va. 233 (1886).

Wisconsin. *Kelley v. Milwaukee*, 18 Wis. 83 (1864).

United States. *Fowle v. Alexandria*, 3 Pet. 398, 408 (1830).

English. *Wilson v. Halifax*, L. R. 3 Exch. 114 (1868); *Forbes v. Lee Conservancy Board*, 4 Exch. Div. 116 (1879).

¹ *Alabama.* *Smoot v. Wetumpka*, 24 Ala. 112 (1854); *Davis v. Montgomery*, 51 Ala. 139 (1874).

Connecticut. *Hewison v. New Haven*, 37 Conn. 475 (1871).

Georgia. *Forsyth v. Atlanta*, 45 Ga. 152 (1872); and see *Parker v. Macon*, 39 Ga. 725 (1869).

Illinois. *Goodrich v. Chicago*, 20 Ill. 445 (1858).

Indiana. *Walker v. Hallock*, 32 Ind. 239 (1869); *Faulkner v. Aurora*, 85 Ind. 130 (1882).

Iowa. *Ogg v. Lansing*, 35 Ia. 495 (1872); *Ball v. Woodbine*, 61 Ia. 83 (1883), (15 N. W. Rep. 846).

Kentucky. *James v. Harrodsburg*, 85 Ky. 191 (1887), (3 S. W. Rep. 135).

Louisiana. *Howe v. New Orleans*, 12 La. An. 481 (1857).

Missouri. *Armstrong v. Brunswick*, 79 Mo. 319 (1883); *Kiley v. Kansas City*, 87 Mo. 103 (1885).

New York. *Connors v. Mayor, etc. of New York*, 11 Hun, 439 (1877); *Cain v. Syracuse*, 95 N. Y. 83 (1884).

North Carolina. *Hill v. Charlotte*, 72 N. C. 55 (1875).

Pennsylvania. *Fair v. Philadelphia*, 88 Pa. St. 309 (1879); *Norristown v. Fitzpatrick*, 94 Pa. St. 121 (1880); *McDade v. Chester*, 117 Pa. St. 414 (1887), (12 Atl. Rep. 421).

Texas. *Fort Worth v. Crawford*, 64 Tex. 202 (1885).

Wisconsin. *Kelley v. Milwaukee*, 18 Wis. 83 (1864).

United States. *Fowle v. Alexandria*, 3 Pet. 398 (1830).

² *Wright v. Augusta*, 78 Ga. 241 (1886); *Brinkmeyer v. Evansville*, 29 Ind. 187 (1867); *Vanhorn v. Des Moines*, 63 Ia. 447 (1884), (19 N. W. Rep. 293); *Patch v. Covington*, 17 B. Monroe (Ky.), 722 (1856); *Tainter v. Worcester*, 123 Mass. 311 (1877); *Wheeler v. Cincinnati*,

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the exercise of their discretion they furnish fire apparatus, can they be held responsible by reason of negligence in using it or in keeping it in repair.¹

Likewise it is the general rule that municipal corporations cannot at common law be made to respond in damages either for a total failure to construct roads, sewers, and other municipal improvements, or for any injuries due solely to the plan of such improvements which the municipal authorities, in the exercise of the discretion intrusted to them, adopted and carried out.² In Indiana this

19 Oh. St. 19 (1869); *Grant v. Erie*, 69 Pa. St. 420 (1871); *Black v. Columbia*, 19 S. C. 412 (1883).

¹ *Howard v. San Francisco*, 51 Cal. 52 (1875); *Torbush v. Norwich*, 38 Conn. 225 (1871); *Greenwood v. Louisville*, 13 Bush (Ky.), 226 (1877); *Yule v. New Orleans*, 25 La. An. 394 (1873); *Heller v. Sedalia*, 53 Mo. 159 (1873); *Foster v. Lookout Water Co.*, 3 Lea (Tenn.), 42 (1879); *Mendel v. Wheeling*, 28 W. Va. 233 (1886); *Hayes v. Oshkosh*, 33 Wis. 314 (1873).

A municipal corporation cannot be made liable by reason of the repeal of an ordinance previously enforced. Thus, where a city made an ordinance providing that cattle should not be allowed in the street, and subsequently suspended it and the plaintiff was injured by cattle running at large, it was held that the corporation was not liable. *Rivers v. Augusta*, 65 Ga. 376 (1880); *Hill v. Charlotte*, 72 N. C. 55 (1875).

² *Colorado*. *Denver v. Capelli*, 4 Col. 25 (1877).

Connecticut. *Diamond Match Co. v. New Haven*, 55 Conn. 510 (1888), (13 Atl. Rep. 409).

Georgia. *Duke v. Rome*, 20 Ga. 635 (1856).

Indiana. *Roll v. Indianapolis*, 52 Ind. 547 (1876); *Rozell v. Anderson*, 91 Ind. 591 (1883).

Iowa. *Van Pelt v. Davenport*, 42 Ia. 308 (1875); *Wicks v. De Witt*, 54 Ia. 130 (1880), (6 N. W. Rep. 176); *German Theo. School v. Dubuque*, 64 Ia. 736 (1883), (17 N. W. Rep. 153).

Kansas. *Atchison v. Challiss*, 9 Kan. 603 (1872).

Massachusetts. *Child v. Boston*, 4 Allen, 41, 51 (1862); *Merrifield v. Worcester*, 110 Mass. 216 (1872).

Michigan. *Toolan v. Lansing*, 38 Mich. 315 (1878).

Missouri. *Imler v. Springfield*, 55 Mo. 119 (1874); *Foster v. St. Louis*, 71 Mo. 157 (1879).

New York. *Wilson v. Mayor, etc. of New York*, 1 Den. 595

last rule has been materially limited by the doctrine, now well established in that state, that municipal corporations are bound to exercise reasonable care in devising the plan of their municipal improvements, as well as in executing it, and are therefore responsible for any damages due to negligence in preparing it.¹ As was said by Mr. Justice Elliott in a recent case:² "It is possible for a common council to act negligently in devising a plan, as well as in any other matter. If that body undertakes to prosecute a public work which requires a plan, and that plan can only be devised and prepared by skilful or experienced men, it would be negligence for it to undertake the work without exercising reasonable care to secure the assistance of such men. A prudent man certainly would not undertake a work of that character without the aid of competent men, and a city is held to substantially the same degree of care as individuals." While this doctrine sounds well, it is open to the objection that it in all cases

(1845); *Kavanagh v. Brooklyn*, 38 Barb. 232 (1862); *Mills v. Brooklyn*, 32 N. Y. 489 (1865); *Lynch v. Mayor, etc. of New York*, 76 N. Y. 60 (1879); *Monk v. New Utrecht*, 104 N. Y. 552 (1887), (11 N. E. Rep. 268).

North Carolina. *Wright v. Wilmington*, 92 N. C. 156 (1885).

Pennsylvania. *Carr v. Northern Liberties*, 35 Pa. St. 324 (1860); *Fair v. Philadelphia*, 88 Pa. St. 309 (1879); *Collins v. Philadelphia*, 93 Pa. St. 272 (1880).

Wisconsin. *Allen v. Chippewa Falls*, 52 Wis. 430 (1881), (9 N. W. Rep. 284); *Smith v. Gould*, 61 Wis. 31 (1884), (20 N. W. Rep. 369).

District of Columbia. *Bannagan v. District of Columbia*, 2 Mackey, 285 (1883).

United States. *Johnston v. District of Columbia*, 118 U. S. 19 (1886), (6 S. Ct. Rep. 923).

¹ *Indianapolis v. Huffer*, 30 Ind. 235 (1868); *Cummins v. Seymour*, 79 Ind. 491 (1881); *Evansville v. Decker*, 84 Ind. 325 (1882); *North Vernon v. Voegler*, 103 Ind. 314 (1885), (2 N. E. Rep. 821); *Rice v. Evansville*, 108 Ind. 7 (1886), (9 N. E. Rep. 139); *Terre Haute v. Hudnut*, 112 Ind. 542 (1887), (13 N. E. Rep. 686).

² *Terre Haute v. Hudnut*, 112 Ind. 542, 547 (1887), (13 N. E. Rep. 686).

requires to be submitted to the jury the ultimate determination of matters that the state has intrusted to the judgment and discretion of the municipal authorities. In other words, it takes the final determination of certain matters out of the hands of those to whom the state committed it, and puts it into the hands of a body which the state never intended should have it. The doctrine finds, however, some support in other jurisdictions.¹

The immunity of municipal corporations from liability to any private citizen while they are in the exercise of their discretionary powers is based upon that public policy which protects the legislator and the judge in the performance of their respective duties. For, although the legislative and judicial duties that devolve upon municipal corporations are not strictly those of the legislator or the judge, yet they so far partake of the nature of such duties that the same reasons which make it desirable to protect the legislator and the judge in the free exercise of their respective duties, apply with equal force to the case of municipal authorities.

¹ *Helena v. Thompson*, 29 Ark. 569 (1874); *Lehn v. San Francisco*, 66 Cal. 76 (1884), (4 Pac. Rep. 965); *Gould v. Topeka*, 32 Kan. 485 (1884), (4 Pac. Rep. 822); *Hitchins v. Frostburg*, 68 Md. 100 (1887), (11 Atl. Rep. 826).

If the execution of the plan adopted results in a direct injury to the plaintiff's property, such as the creation of a nuisance, the corporation may be liable. *Metropolitan Asylum District v. Hill*, L. R. 6 App. Cas. 193 (1881); *Siefert v. Brooklyn*, 101 N. Y. 136 (1886), (4 N. E. Rep. 321). In the latter case Chief Justice Ruger says, at page 143: "The exercise of a judicial or discretionary power, by a municipal corporation, which results in a direct and physical injury to the property of an individual, and which from its nature is liable to be repeated and continuous, but is remediable by a change of plan, or the adoption of prudential measures, renders the corporation liable for such damages as occur in consequence of its continuance of the original course after notice, and an omission to adopt such remedial measures as experience has shown to be necessary and proper."

§ 7. Ministerial Duties. — Although the duty of determining whether or not the municipal corporation shall undertake any particular improvement for its own special interest and advantage, and, if it decides to so do, the duty of devising the plan in accordance with which the work shall be done, rest entirely in the discretion of the municipal authorities, the actual prosecution of the work stands on a different basis. When a corporation has adopted its plan of municipal improvement, judicial or discretionary duty ceases. The duty involved in carrying it out — the actual doing of the work — is purely ministerial and absolute. With this change in the nature of the duty comes also a change in the rule of liability. The corporation drops the character of the quasi legislator or judge with its immunities, and assumes that of the legal individual with its liabilities. As Mr. Justice Carpenter has tersely expressed it:¹ “Where judicial duty ends and ministerial duty begins, there immunity ceases and liability attaches.”

It is the universal rule, therefore, that municipal corporations, although there be no statute expressly creating the liability, are bound to see that all purely ministerial and absolute duties undertaken by them are performed with reasonable care and prudence, and are responsible in damages for any failure so to perform them, to the same extent as a business corporation or a private individual would be in like circumstances.² This rule is, it appears,

¹ *Jones v. New Haven*, 34 Conn. 1, 14 (1867).

² *Alabama*. *Smoot v. Wetumpka*, 24 Ala. 112 (1854); *Montgomery v. Gilmer*, 33 Ala. 116, 130 (1858); *Albrittin v. Huntsville*, 60 Ala. 486 (1877).

Arkansas. *Little Rock v. Willis*, 27 Ark. 572 (1872).

California. *Spangler v. San Francisco*, 84 Cal. 12 (1890), (23 Pac. Rep. 1091).

Colorado. *Denver v. Dunsmore*, 7 Col. 328 (1884), (3 Pac. Rep.

simply an application to municipal corporations of that general doctrine that all persons are bound to see that the

705); *Boulder v. Niles*, 9 Col. 415 (1886), (12 Pac. Rep. 632); *Denver v. Rhodes*, 9 Col. 554 (1886), (13 Pac. Rep. 729).

Connecticut. *Jones v. New Haven*, 34 Conn. 1 (1867).

Florida. *Tallahassee v. Fortune*, 3 Fla. 19 (1850).

Georgia. *Parker v. Macon*, 39 Ga. 725 (1869); *Savannah v. Waldner*, 49 Ga. 316 (1873); *Milledgeville v. Cooley*, 55 Ga. 17 (1875); *Rome v. Dodd*, 58 Ga. 238 (1877).

Illinois. *Browning v. Springfield*, 17 Ill. 143 (1855); *Lacon v. Page*, 48 Ill. 499 (1868); *Bloomington v. Bay*, 42 Ill. 508 (1867); *Springfield v. Le Claire*, 49 Ill. 476 (1869); *Champaign v. Patterson*, 50 Ill. 61 (1869); *Sterling v. Thomas*, 60 Ill. 264 (1871).

Indiana. *Logansport v. Wright*, 25 Ind. 512 (1865); *Grove v. Fort Wayne*, 45 Ind. 429 (1874); *Centerville v. Woods*, 57 Ind. 192 (1877).

Iowa. *Wallace v. Muscatine*, 4 Greene, 373 (1854); *Cotes v. Davenport*, 9 Ia. 227 (1859); *Ellis v. Iowa City*, 29 Ia. 229 (1870).

Kansas. *Smith v. Leavenworth*, 15 Kan. 81 (1875); *Jansen v. Atchison*, 16 Kan. 358 (1876).

Louisiana. *O'Neill v. New Orleans*, 30 La. An. 220 (1878).

Maryland. *Baltimore v. Pendleton*, 15 Md. 12 (1860); *Hitchins v. Frostburg*, 68 Md. 100 (1887), (11 Atl. Rep. 826).

Massachusetts. *Child v. Boston*, 4 Allen, 41 (1862); *Merrifield v. Worcester*, 110 Mass. 216 (1872).

Michigan. *Detroit v. Corey*, 9 Mich. 165 (1861).

Minnesota. *Furnell v. St. Paul*, 20 Minn. 117 (1873); *Kobs v. Minneapolis*, 22 Minn. 159 (1875); *Simmer v. St. Paul*, 23 Minn. 408 (1877); *Bohen v. Waseca*, 32 Minn. 176 (1884), (19 N. W. Rep. 730).

Mississippi. *Bell v. West Point*, 51 Miss. 262 (1875); *Vicksburg v. Hennessy*, 54 Miss. 391 (1877).

Missouri. *Blake v. St. Louis*, 40 Mo. 569 (1867); *Bassett v. St. Joseph*, 53 Mo. 290 (1873); *Craig v. Sedalia*, 63 Mo. 417 (1876); *Welsh v. St. Louis*, 73 Mo. 71 (1880); *Russell v. Columbia*, 74 Mo. 480, 490 (1881); *Halpin v. Kansas City*, 76 Mo. 335 (1882).

Nebraska. *Omaha v. Olmstead*, 5 Neb. 446 (1877).

Nevada. *McDonough v. Virginia City*, 6 Nev. 90 (1870).

New Hampshire. *Gilman v. Laconia*, 55 N. H. 130 (1875); *Rowe v. Portsmouth*, 56 N. H. 291 (1876).

New York. *Bailey v. Mayor, etc. of New York*, 3 Hill, 531 (1842); *Mayor, etc. of New York v. Furze*, 3 Hill, 612 (1842); *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463 (1850); *Lloyd v. Mayor, etc. of New York*, 5 N. Y. 369 (1851); *Conrad v. Ithaca*, 16 N. Y. 158 (1857); *Weet v. Brockport*, 16 N. Y. 161 (1857); *Storrs v. Utica*, 17 N. Y.

property in their charge and under their control is kept in a reasonably safe condition.

§ 8. Municipal Corporations are not Insurers. — Aside from certain wilful acts, such as trespass, the disturbance of natural easements, the creation of nuisances, the non-compliance with statutory regulations, and the like, for 104 (1858); *Wendell v. Troy*, 39 Barb. 329 (1862); *Barton v. Syracuse*, 36 N. Y. 54 (1867); *Clark v. Lockport*, 49 Barb. 580 (1867); *Davenport v. Ruckman*, 37 N. Y. 568 (1868); *Requa v. Rochester*, 45 N. Y. 129 (1871); *McCarthy v. Syracuse*, 46 N. Y. 194 (1871); *Ring v. Cohoes*, 77 N. Y. 83 (1879); *Noonan v. Albany*, 79 N. Y. 470 (1880); *Saulsbury v. Ithaca*, 94 N. Y. 27 (1883); *Ehriggott v. Mayor, etc. of New York*, 96 N. Y. 264 (1884); *Nelson v. Canistoe*, 100 N. Y. 89 (1885), (2 N. E. Rep. 473); *Hubbell v. Yonkers*, 35 Hun, 349 (1885).

North Carolina. *Meares v. Wilmington*, 9 Ired. L. 73 (1848).

Ohio. *Dayton v. Pease*, 4 Oh. St. 80 (1854).

Oregon. *Farquar v. Roseburg*, 18 Oreg. 271 (1890), (22 Pac. Rep. 1103).

Pennsylvania. *Pittsburg v. Grier*, 22 Pa. St. 54 (1853); *Erie City v. Schwingle*, 22 Pa. St. 384 (1853); *Fritsch v. Allegheny*, 91 Pa. St. 226 (1879).

Tennessee. *Memphis v. Lasser*, 9 Humph. 757 (1849); *Niblett v. Nashville*, 12 Heisk. 684 (1874).

Texas. *Galveston v. Posnainsky*, 62 Tex. 118 (1884); *Galveston v. Barbour*, 62 Tex. 172 (1884).

Vermont. *Winn v. Rutland*, 52 Vt. 481 (1880).

Virginia. *Noble v. Richmond*, 31 Gratt. 271 (1879); *Gordon v. Richmond*, 83 Va. 436 (1887), (2 S. E. Rep. 727).

West Virginia. *Wilson v. Wheeling*, 19 W. Va. 323 (1882).

Wisconsin. *Gilluly v. Madison*, 63 Wis. 518 (1885), (24 N. W. Rep. 137).

United States. *Weightman v. Washington*, 1 Black, 39 (1861); *Chicago City v. Robbins*, 2 Black, 418 (1862); *Nebraska City v. Campbell*, 2 Black, 590 (1862); *Mayor, etc. of New York v. Sheffield*, 4 Wall. 189 (1866); *Barnes v. District of Columbia*, 91 U. S. 540 (1875); *Evanston v. Gunn*, 99 U. S. 660 (1878); *Delger v. St. Paul*, 14 Fed. Rep. 567 (1882).

England. *Mayor of Lynn v. Turner*, 1 Cowper, 86 (1774); *Lyme Regis v. Henley*, 3 B. & Ad. 77 (1832); *Lancaster Canal Co. v. Par-naby*, 11 A. & E. 223 (1839); *Mersey Docks Trustees v. Gibbs*, 11 H. L. Cas. 686 (1866).

which they are generally held responsible to the same extent as any legal individual, the entire liability of municipal corporations for tort is based upon negligence.¹ They are in no wise insurers. At common law no obligation rests upon them to perform their private and corporate duties at all times and at all hazards in an absolutely safe manner.² Reasonable care, skill, and diligence in the performance of those duties is the sole measure of their common law obligation toward private individuals. Such a degree of care and skill they are bound to exercise; if they have done that, they cannot be held responsible for the consequences. Thus, in the absence of negligence on their part, municipal corporations are not liable for injuries due to defects in sewers;³ or for damages caused by defects in highways⁴ or by defects in water works.⁵

¹ A municipal corporation cannot assume by contract a liability for tort in cases where the law does not impose one. *Vanhorn v. Des Moines*, 63 Ia. 447, 450 (1884), (19 N. W. Rep. 293).

² *Smith v. Mayor, etc. of New York*, 66 N. Y. 295 (1876); *Village v. Kallagher*, 52 Oh. St. 183 (1894), (39 N. E. Rep. 144); *Wilson v. Wheeling*, 19 W. Va. 323 (1882).

³ *Denver v. Rhodes*, 9 Col. 554 (1886); (13 Pac. Rep. 729); *McCarthy v. Syracuse*, 46 N. Y. 194 (1871); *Wright v. Wilmington*, 92 N. C. 156 (1885).

⁴ *Parker v. Macon*, 39 Ga. 725 (1869); *Atlanta v. Perdue*, 53 Ga. 607 (1875); *Rockford v. Hildebrand*, 61 Ill. 155 (1871); *Fahey v. Harvard*, 62 Ill. 28 (1871); *Centralia v. Krouse*, 64 Ill. 19 (1872); *Chicago v. Hoy*, 75 Ill. 530 (1874); *Chicago v. McGiven*, 78 Ill. 347, 352 (1875); *Aurora v. Hillman*, 90 Ill. 61 (1878); *Joliet v. Walker*, 7 Ill. App. 267 (1880); *Fort Wayne v. De Witt*, 47 Ind. 391 (1874); *Aurora v. Bitner*,

⁵ *Brown v. Atlanta*, 66 Ga. 71, 77 (1880); *Jenney v. Brooklyn*, 120 N. Y. 164 (1890), (24 N. E. Rep. 274); *Bishop v. Schuylkill*, 8 Atl. Rep. 449 (Pa. 1887).

A broader rule of liability appears to be laid down in certain early Ohio cases. See *McCombs v. Akron*, 15 Oh. 474 (1846); *Rhodes v. Cleveland*, 10 Oh. 159 (1840).

§ 9. The Liability limited by the Means for Performance.—It is a general principle that nothing can constitute a duty which the law does not afford the means to perform. This principle applies with peculiar force to municipal corporations, confined as they are to the exercise of those powers, and those only, that the legislature has conferred upon them. It is generally conceded, therefore, that the obligation to perform the private and municipal duties which rest upon them is strictly limited by the means at their command with which to perform them.¹ Municipal corporations are, consequently, held not to be liable for any failure to undertake a work, to pay for which they have not the means at their command.²

This limitation upon their liability, however, does not depend ultimately upon the question whether or not they have funds actually in the treasury which might have been applied to remedy the conditions that caused the damage.³ The vital question in every case is whether or

100 Ind. 396 (1884); *Doulon v. Clinton*, 33 Ia. 397 (1871); *Holmes v. Hamburg*, 47 Ia. 348 (1877); *Stafford v. Oskaloosa*, 57 Ia. 748 (1882), (11 N. W. Rep. 668); *Cook v. Anamosa*, 66 Ia. 427, 428 (1885), (23 N. W. Rep. 907); *Atchison v. King*, 9 Kan. 550, 557 (1872); *Smith v. Leavenworth*, 15 Kan. 81 (1875); *Wellington v. Gregson*, 31 Kan. 99 (1883), (1 Pac. Rep. 253); *Craig v. Sedalia*, 63 Mo. 417 (1876); *Hutson v. Mayor, etc. of New York*, 9 N. Y. 163 (1853); *McGinty v. Same*, 5 Duer, (N. Y.) 674 (1856); *Hart v. Brooklyn*, 36 Barb. (N. Y.) 226 (1862); *Todd v. Troy*, 61 N. Y. 506 (1875); *Ring v. Cohoes*, 77 N. Y. 83, 86 (1879); *Goodfellow v. Mayor, etc. of New York*, 100 N. Y. 15 (1885), (2 N. E. Rep. 462); *Hunt v. Same*, 109 N. Y. 134 (1888), (16 N. E. Rep. 320); *Scranton v. Catterson*, 94 Pa. St. 202 (1880); *Noble v. Richmond*, 31 Gratt. (Va.) 271 (1879).

¹ *Garlinghouse v. Jacobs*, 29 N. Y. 297 (1864); *Hover v. Barkhoof*, 44 N. Y. 113 (1870); *Hines v. Lockport*, 50 N. Y. 236 (1872); *Erie v. Schwingle*, 22 Pa. St. 384 (1853); *Evanston v. Gunn*, 99 U. S. 660, 667 (1878), and cases cited in following notes.

² *Garlinghouse v. Jacobs*, 29 N. Y. 297 (1864).

³ If there are funds in the treasury that might have been applied to remedy the defective conditions which caused the damage, it makes

not, if the necessary funds are not in the treasury, the corporation has the power to raise them by taxation or otherwise,¹ or has the power to enforce contributions of labor from its citizens by means of which the necessary work might have been done.² For, if it possesses either the power to raise the necessary funds, or the power to enforce contributions of labor, by the exercise of which the means for removing the defective conditions might have been supplied, and yet neglects to exercise such power, the defence of a lack of means can afford it no protection.

But, while a lack of means may afford a defence for a failure to do what would constitute a duty if there were sufficient funds at command, it does not furnish an excuse for a failure to use due care and skill in the execution of whatever work a municipal corporation has actually undertaken. Thus, where a city undertook to grade a street and to construct gutters therein, and did the work in a careless and unskilful manner because, as it was alleged, of a lack of means, and the plaintiff was damaged

no difference how they came there. Thus, where it appeared that the funds raised by taxation for the year had been exhausted; that the corporation was prohibited by its charter from pledging its credit; but that there was money in the treasury which had been raised on the individual credit of the members of the common council, and which might have been used to remove the defect that caused the injury, it was held that, so far as the question of means was concerned, the corporation was liable. *Moon v. Ionia*, 81 Mich. 635 (1890), (46 N. W. Rep. 25).

¹ *Albrittin v. Huntsville*, 60 Ala. 486 (1877); *Shartle v. Minneapolis*, 17 Minn. 308 (1871); *Adsit v. Brady*, 4 Hill (N. Y.), 630 (1843); *Peach v. Utica*, 10 Hun (N. Y.), 477 (1877); *Eveleigh v. Hounsfield*, 34 Hun (N. Y.), 140 (1884); *Erie v. Schwingle*, 22 Pa. St. 384 (1853); *Evanston v. Gunn*, 99 U. S. 660, 667 (1878).

² *Shelby v. Clagett*, 46 Oh. St. 549 (1889), (22 N. E. Rep. 407); and see also *Whitfield v. Meridian*, 66 Miss. 570 (1889), (6 So. Rep. 244); *Monk v. New Utrecht*, 104 N. Y. 552 (1887), (11 N. E. Rep. 268).

in consequence of such negligence, it was held that the lack of funds afforded no defence.¹

¹ *Bartle v. Des Moines*, 38 Ia. 414 (1874).

The legislature has the power, unless restrained by the state constitution, to insert in the charter of a municipal corporation a provision relieving it from liability for any non-feasance or misfeasance of its officers. *Gray v. Brooklyn*, 50 Barb. (N. Y.) 365 (1868).

In *Louisville v. McGill*, 52 S. W. Rep. 1053 (Ky. 1899), a statutory provision prescribing a limitation of six months as to actions against cities of the first class for injuries to person or property was declared to be special legislation, and therefore unconstitutional.

A municipal corporation has been held not to be liable for damages resulting from a conspiracy among its inhabitants to prevent, by threats and personal violence, the living and laboring of colored people within its limits, even though it had full knowledge of such conspiracy. *Wallace v. Norman*, 9 Okl. 339 (1900), (60 Pac. Rep. 108).

CHAPTER II.

THE LIABILITY FOR ULTRA VIRES TORTS.

§ 10. Where the Injury is due to Acts outside the Scope of the Corporate Powers.—Quasi corporations and municipal corporations proper are purely the creatures of the state. They have such powers as the state, by valid legislative enactment,¹ has seen fit expressly to confer upon them, and such powers as are necessarily incident to the powers so conferred.² They have no greater authority, and can lawfully do no acts not so authorized. Hence, in order to create any civil liability for tort on the part of such corporate bodies, the acts complained of must be within the scope of their corporate powers as defined by charter and general laws. If such acts transcend the powers so defined, they are in no wise responsible for the consequences of them in a private action, even though they may have expressly authorized their officers to do them. Such acts are *ultra vires*, and cannot be made the basis of an action for damages.³

¹ If the statute conferring a power upon a municipal corporation is unconstitutional, it will not be liable for any injuries done while in the exercise of it. *Albany v. Cunliff*, 2 N. Y. 165 (1849).

² See *Leeds v. Richmond*, 102 Ind. 372 (1885), (1 N. E. Rep. 711).

³ *Colorado. Idaho Springs v. Woodward*, 10 Col. 104 (1887), (14 Pac. Rep. 49); *Idaho Springs v. Filteau*, 10 Col. 105 (1887), (14 Pac. Rep. 48).

Louisiana. *Hoggard v. Monroe*, 51 La. An. 683 (1899), (25 So. Rep. 349).

Maine. *Seele v. Deering*, 79 Me. 343 (1887), (10 Atl. Rep. 45).

Maryland. *Horn v. Baltimore*, 30 Md. 218 (1868).

Massachusetts. *Anthony v. Adams*, 1 Met. 284 (1840); *Cushing v.*

Bedford, 125 Mass. 526 (1878); *Lemon v. Newton*, 134 Mass. 476 (1883).

Minnesota. *Boye v. Albert Lea*, 74 Minn. 230 (1898), (76 N. W. Rep. 1131).

Missouri. *Worley v. Columbia*, 88 Mo. 106 (1885).

New Hampshire. *Wakefield v. Newport*, 60 N. H. 374 (1880).

New York. *Smith v. Rochester*, 76 N. Y. 506 (1879).

Utah. *Royce v. Salt Lake City*, 15 Utah, 401 (1897), (49 Pac. Rep. 290).

CHAPTER III.

THE LIABILITY FOR THE ACTS OF OFFICERS AND AGENTS.

§ 11. **The Doctrine of Respondeat Superior.**—There can be no question to-day, if there ever was, but that the general common law doctrine which requires the superior or employer to answer civilly for any neglect or want of skill on the part of his servant or agent while acting in the line of his duty, by which another is injured, applies to municipal corporations. Indeed, it may be set down as well settled that, in a proper case, the maxim *respondeat superior* applies to them in the same manner and to the same extent as in the case of private individuals. The difficulty experienced by the courts has been, for the most part, not in determining whether the maxim had any application to them, but in determining whether the particular case was a proper one for its application,—in other words, in determining whether or not the relation of superior and servant or agent existed between the corporation and the person whose negligence caused the damage.¹ And this has, in some instances, proved to be a question of considerable difficulty.²

It is, of course, familiar law that the liability of a superior or employer for the acts of his servant or agent rests upon the right of the former to select his own ser-

¹ *Wilcox v. Chicago*, 107 Ill. 334 (1883); *Maxmilian v. Mayor, etc. of New York*, 62 N. Y. 160 (1875); *Smith v. Rochester*, 76 N. Y. 506 (1879); *Dayton v. Pease*, 4 Oh. St. 80 (1854).

² See *Bailey v. Mayor, etc. of New York*, 3 Hill (N. Y.) 531 (1842); and *Mayor, etc. of New York v. Bailey*, 2 Den. (N. Y.) 433 (1845).

vant or agent; to discharge him if he proves to be not competent, or skilful, or well behaved; to determine his duties; and to direct and control him while engaged in the performance of them. This broad right is the whole foundation of the doctrine of *respondeat superior*. If such right does not exist in any particular case, the defendant cannot properly be regarded as the superior of the person who caused the damage, and this doctrine, therefore, can have no application to it.

A municipal corporation as a superior or employer occupies a somewhat unique position. Though an agent or official may derive his appointment from it and be engaged in the performance of its duties, he may nevertheless not be its agent within the above rules. The ultimate question in every case appears to be: What was the nature of the duty in the performance of which the negligent agent or official was engaged at the time of the injury or damage? Was it a public, governmental duty imposed by the legislature upon such official when selected by the corporation? Or was it a private, municipal duty, undertaken for the emolument of, and under the full control of, the corporation? It is the universal rule that, if the duty was of the former class, the relation of superior and agent does not exist, and that consequently the maxim *respondeat superior* does not apply;¹ but otherwise, if the duty falls within the latter class.²

§ 12. The Method of appointing Officers and Agents.—As affecting the question of the responsibility of a municipal corporation for the acts of the officers and agents who are engaged in the performance of the duties resting upon it, the manner in which they receive their appointment is not material. It can hardly be considered even

¹ See cases cited under §§ 17-22, *post*.

² See cases cited under §§ 23-25, *post*.

as a makeweight that might aid in the determination of the question.¹ Thus, an officer may be appointed directly by the state authorities, and yet be an agent of the corporation for whose acts it may be liable.² But, when an officer is so appointed, it is essential, in order to fasten the liability for his acts upon the corporation, that it should have accepted him as its officer.³ On the other hand, a municipal corporation may not be responsible for the negligent or tortious acts of officers or agents whose appointment comes immediately or intermediately from itself.⁴

But, however he may receive his appointment, before any liability can attach to the corporation, the officer for whose tortious act it is sought to hold it responsible must be an officer *de jure*. It is not enough that he is a *de facto* officer, engaged at the time in the performance of the duties incident to the office to which he had been chosen. Thus, where a pound-keeper had been duly elected, had taken the oath of office, and had entered upon the performance of its duties, but his bond as such officer had not been approved, as was required by statute, it was held that, since he had not been legally qualified to act for the corporation, it was not liable for his tortious acts.⁵

§ 13. The Competency of the Officer or Agent. — When the selection of officers and agents rests with the municipal corporation itself, it is bound to exercise due care and

¹ Barnes *v.* District of Columbia, 91 U. S. 540, 546 (1875); Bryant *v.* St. Paul, 33 Minn. 289 (1885), (23 N. W. Rep. 220).

² Bailey *v.* Mayor, etc. of New York, 3 Hill (N. Y.), 531 (1842); Esberg Cigar Co. *v.* Portland, 34 Oreg. 282 (1899), (55 Pac. Rep. 961).

³ Van Valkenburgh *v.* Mayor, etc. of New York, 43 Barb. (N. Y.) 109 (1864).

⁴ Maxmilian *v.* Mayor, etc. of New York, 62 N. Y. 160 (1875); Aldrich *v.* Tripp, 11 R. I. 141 (1875), and cases cited under §§ 17-22, *post.*

⁵ Rounds *v.* Bangor, 46 Me. 541 (1859).

prudence to select such as are competent to perform the duties of the office to which they are appointed, particularly if those duties are of such a character as to require special knowledge or technical skill. If there is a failure in this regard, and an incompetent officer is selected, the corporation cannot escape responsibility under the plea that it acted on his advice and relied on his judgment.¹

If, however, a corporation has selected an officer competent to discharge the duties resting upon him, it has discharged its whole duty in this direction, and no direct omission or negligence can be attributed to it. Thus, where a corporation had appointed a competent engineer who had in good faith drafted the plans for a culvert, but through an error in judgment had not made provision for one sufficiently large to accomplish the desired purpose, it was held that the corporation was not responsible for the damage resulting from such insufficiency.²

§ 14. Unauthorized Acts of Officers and Agents — Ratification. — It is a matter of familiar law that the responsibility of a superior for the acts of those in his service depends in a considerable measure upon the relation of those acts to the service in the course of which they were performed. It is not every tortious act of the servant that imposes liability upon him, but only those done while the servant was acting in the line of his employment.

These common law principles apply to municipal corporations in like manner as to individuals. They also are not, as a general rule, responsible for the wholly unauthorized acts of their officers and agents, although

¹ *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463, 465 (1850). But see *Craig v. Charleston*, 180 Ill. 154 (1899), (54 N. E. Rep. 184).

² *Van Pelt v. Davenport*, 42 Ia. 308, 312 (1875). The court in that case says : "If he is sufficiently competent and makes a mistake after the honest exercise of his best judgment, it is such a mistake as is inseparable from human action."

they may be done under color of office.¹ To render them responsible for tortious acts committed by persons claiming to act for them, or by their authority, it must appear that such persons were expressly authorized by the municipal government to do the acts in question; or that they were done *bona fide* in pursuance of a general authority to act for the municipality on the subject to which they relate; or that the acts, originally unauthorized, were subsequently adopted and ratified by the corporation.²

The power of municipal corporations to ratify acts done without original authority appears to be exactly coextensive with the power to authorize them in the beginning. It cannot be broader. And a ratification in the case of a corporation may be inferred from any facts from which it might be inferred in the case of an individual.³ But the

¹ *Chicago v. McGraw*, 75 Ill. 566 (1874); *Ball v. Woodbine*, 61 Ia. 83 (1883), (15 N. W. Rep. 846); *Cumberland v. Willison*, 50 Md. 138, 158 (1878); *Morrison v. Lawrence*, 98 Mass. 219 (1867); *McCarthy v. Boston*, 135 Mass. 197, 200 (1883); *Cuyler v. Rochester*, 12 Wend. (N. Y.) 165 (1834); *Everson v. Syracuse*, 100 N. Y. 577 (1885), (3 N. E. Rep. 784); *Donnelly v. Tripp*, 12 R. I. 97 (1878); *Elliott v. Philadelphia*, 75 Pa. St. 347 (1874). "The duties and powers of the officers of a municipal corporation are prescribed by the statute, and every person dealing with them as such, may know, and is charged with the knowledge of the nature of their duties and extent of their powers." *Treadway v. Schnauber*, 1 Dak. 236, 248 (1875), (46 N. W. Rep. 464). And these powers cannot be extended by contract. *Manley v. Atchison*, 9 Kan. 358 (1872).

² *Thayer v. Boston*, 19 Pick. (Mass.) 511 (1837); *Hilsdorf v. St. Louis*, 45 Mo. 94 (1869); *Peters v. Mayor, etc. of New York*, 8 Hun (N. Y.), 405 (1876); *Sprague v. Tripp*, 13 R. I. 38 (1880).

"Whether a particular act, operating injuriously to an individual, was authorized by the city, by any previous delegation of power, general or special, or by any subsequent adoption and ratification of particular acts, is a question of fact, to be left to a jury, to be decided by all the evidence in the case." Chief Justice Shaw in *Thayer v. Boston*, 19 Pick. (Mass.) 511, 516 (1837).

³ *Dubuque Fem. College v. Dubuque*, 13 Ia. 555 (1862); *Wilde v. New Orleans*, 12 La. An. 15 (1850); *Emerson v. Newbury*, 13 Pick.

mere fact of ratification cannot extend their liability for tort to matters as to which no liability would otherwise attach to them. Thus, it has been held that since a municipal corporation was not liable for the unlawful acts of its police officers while engaged in the performance of their duties, it could not become so by subsequently ratifying such acts.¹

§ 15. Ultra Vires Acts.—In order to establish a liability against a municipal corporation for the tortious acts of its officers or agents, it is essential that those acts should be within the scope of the corporate powers, as provided by charter or positive enactment of law. If the acts complained of were outside of the authority and power of the corporation as conferred by the legislature, it is not liable, whether its officers directed their performance or they were done without any express direction or command. Such acts are *ultra vires*—wholly beyond the power of the corporation to do, and cannot therefore be made the basis of an action for damages.² And this rule applies also

(Mass.) 377 (1832); *Davis v. Jackson*, 61 Mich. 530 (1886), (28 N. W. Rep. 526); *Peterson v. Mayor, etc. of New York*, 17 N. Y. 449, 453 (1858); *City v. Hays*, 93 Pa. St. 72 (1881).

In *Mitchell v. Rockland*, 52 Me. 118, 125 (1860), Chief Justice Appleton says, by way of dictum: “It may well be doubted, whether the city government could legally ratify the negligent, careless, or tortious acts of their officers, knowing them to be such, so as to make the city liable therefor. . . . There is no authority given to the town, to ratify the official negligence of its officers. A distinction may be taken between the ratification of an unauthorized act by an individual, who is personally responsible for the consequences of his action, and a ratification by the officers of a municipal corporation, the effect of which would be to impose burdens more or less onerous upon their constituents.” No authority has been found in support of the views here expressed.

¹ *Calwell v. Boone*, 51 Ia. 687, 689 (1879), (2 N. W. Rep. 614); *Buttrick v. Lowell*, 1 Allen (Mass.), 172 (1861).

² *Browning v. Owen County*, 44 Ind. 11 (1873); *Shelby County v.*

where the corporation was, at the time of the injury, acting under the provisions of a statute that proved to be unconstitutional.¹

This class of cases, in which there is an entire want of authority in the corporation itself to act in the premises, is, of course, to be distinguished from that class where the authority to do the acts complained of exists, but has been defectively or irregularly exercised.² In the latter class of cases the corporation is liable in an action to the same extent as any employer.³

§ 16. Where the Duty is imposed, not upon the Corporation, but upon the Officer. — Municipal corporations are legally responsible only for the performance of duties due from them in their corporate capacity. This is simply the application to them of a general principle of the common law. It follows from this that if, under the terms of the act of the legislature that creates the duty, its performance is imposed upon specified officials, the corporation is not liable for their tortious acts done in the course of the performance of that duty, even though it be a duty ordinarily due from the corporation itself. Such

Deprez, 87 Ind. 509 (1882); Seele *v.* Deering, 79 Me. 343 (1887); (10 Atl. Rep. 45); Anthony *v.* Adams, 1 Met. (Mass.) 284 (1840); Morrison *v.* Lawrence, 98 Mass. 219 (1867); Cavanagh *v.* Boston, 139 Mass. 426 (1885); (1 N. E. Rep. 834); Cheeney *v.* Brookfield, 60 Mo. 53 (1875); Worley *v.* Columbia, 88 Mo. 106 (1885); Wakefield *v.* Newport, 60 N. H. 374 (1880); Albany *v.* Cunliff, 2 N. Y. 165 (1849); Smith *v.* Rochester, 76 N. Y. 506 (1879); Hart *v.* Bridgeport, 13 Blatch. (U. S. C. C.) 289, 294 (1876).

"Municipal corporations are limited to the exercise of powers expressly conferred, and those not specially delegated are prohibited." Mr. Justice Ray, in Worley *v.* Columbia, 88 Mo. 106, 111 (1885).

¹ Albany *v.* Cunliff, 2 N. Y. 165 (1849).

² See Treadway *v.* Schnauber, 1 Dak. 236, 249 (1875), (46 N. W. Rep. 464).

³ Howell *v.* Buffalo, 15 N. Y. 512 (1857), and see cases cited under § 13, *ante*.

officials are regarded as independent, bearing no personal relation to the corporation. Thus, where water commissioners were, by the terms of the statute under which they were appointed and acted, made a board wholly independent of the municipal authorities in the performance of the duties relative to the city waterworks, it was held that the corporation was not liable for their negligent acts as such officers.¹ And so, where street commissioners were appointed and acted under a statute which imposed upon them as such officials the duty of keeping the highways of the corporation in proper repair, it was held that the corporation was not responsible for the consequences of their neglect of this duty.²

§ 17. The Nature of the Duty in the Performance of which the Injury is done.—As was pointed out in a prior section,³ the test question in order to determine whether or not a municipal corporation is responsible for the acts of any particular officers or agents is not, By whom were they appointed? but, What was the character of the duty in the performance of which they were engaged at the time of the injury?⁴ The general principle is well settled that

¹ *Ashby v. Erie*, 85 Pa. St. 286 (1877).

² *Hickok v. Plattsburg*, 15 Barb. (N. Y.) 427 (1853).

To the same point see also *Martin v. Brooklyn*, 1 Hill (N. Y.), 545, 550 (1841); *Ham r. Mayor, etc. of New York*, 70 N. Y. 459 (1877); *New York, etc. Lumber Co. v. Brooklyn*, 71 N. Y. 580 (1878); *Theall v. Yonkers*, 21 Hun (N. Y.), 265 (1880). And see *Sutton v. Board of Police*, 41 Miss. 236 (1866).

³ § 11, *ante*.

⁴ See discussion in *Bryant v. St. Paul*, 33 Minn. 289 (1885), (23 N. W. Rep. 220); *Wilson v. Mayor, etc. of New York*, 1 Den. (N. Y.) 595 (1845); *Maximilian v. Mayor, etc. of New York*, 62 N. Y. 160 (1875). The practical question is, says Mr. Justice Folger, in the latter case, Are the acts that are to be done by the officers in question, "acts to be done by them in their capacity as public officers in the discharge of duties imposed upon them by the legislature for the public benefit; or are they acts done for the defendant, in what may be

where a corporation elects or appoints an officer, in obedience to an act of the legislature, who is to perform some public service in which the corporation itself has no private interest, and from which it derives no special advantage in its corporate capacity, such officer is not to be regarded as an agent of the corporation for whose negligence or want of skill it can be held responsible. In every such case the officer is a purely public official, whose functions are the performance of governmental duties, which are imposed and defined by the legislature, and not by the corporation. The power of the latter in the premises is exhausted when it has appointed or elected the officer. His official tenure and the manner of performing his official duties are independent of the will of the corporation, and are determined by the provisions of the act of the legislature under which he was appointed or elected. It necessarily follows from this that there is no ground upon which the corporation can fairly be considered as the superior of such officer, and so liable for his tortious acts.¹

called its private character, in the management of property or rights voluntarily held by it for its own immediate profit or advantage as a corporation, though inuring ultimately to the benefit of the public?" At page 167.

¹ *Small v. Danville*, 51 Me. 359 (1864); *Woodcock v. Calais*, 66 Me. 234 (1877); *Tindley v. Salem*, 137 Mass. 171 (1884); *Maxmilian v. Mayor, etc. of New York*, 62 N. Y. 160 (1875); *Bartlett v. Clarksburg*, 45 W. Va. 393 (1898), (31 S. E. Rep. 918), and cases cited under §§ 18-28, *post*.

In *Mead v. New Haven*, 40 Conn. 72 (1873), the defendant corporation was held not liable for the negligent acts of a boiler inspector, on the ground that it had no pecuniary, or individual, or private interest in the inspection of boilers. The court says: "Although the power of the city over the subject is conferred by the charter and not by the general law, yet the city must, we think, be regarded as the agent of the government, and acting for the state and not for itself in making the appointment of inspectors."

In *Gibbes v. Beanfort*, 20 S. C. 213 (1883), it was held that the cor-

If, however, the officer is chosen to perform private duties, from the performance of which the corporation derives some emolument or advantage as a corporation, though it may enure ultimately to the benefit of the public, it is the superior of such officer and responsible for his acts. For here it has voluntarily undertaken to perform duties for its own profit, the agencies and the manner of performing which are fully in its control. In short, the municipal corporation in such cases assumes exactly the same position as a private corporation, in like circumstances, and is subject to the same responsibilities.¹

The general result of the adjudications upon this point is summed up in a single sentence by Mr. Justice Currier in *Murtaugh v. St. Louis*,² as follows: "Where the officer or servant of a municipal corporation is in the exercise of a power conferred upon the corporation for its private benefit, and injury ensues for the negligence or misfeasance of such officer or servant, the corporation is liable, as in the case of private corporations or parties; but when the acts or omissions complained of were done or omitted in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for private corporate advantage, then the corporation is not liable for the consequences of such acts or omissions on the part of its officers and servants."

§ 18. Officers performing Legislative or Judicial Duties.
— That large and varied class of discretionary duties poration was not liable in damages to the plaintiff for injuries to his ferry, caused by the establishment of one by the municipal authorities, which was to be a free ferry, on the ground that this was to facilitate commerce; to provide certain and safe transit to the public; to promote general convenience, and not the private advantage of the corporation.

¹ Aldrich *v.* Tripp, 11 R. I. 141 (1875), and cases cited under §§ 24–26, *post*.

² 44 Mo. 479, 480 (1869).

which devolves upon municipal corporations, though, as elsewhere pointed out,¹ not strictly legislative or judicial, is governmental in nature. This appears never to have been questioned. The rule has become firmly established, therefore, that municipal corporations are not liable at common law for the acts or omissions of their officers or agents done or omitted while engaged in the performance of duties of this character. Thus, they are not liable for a failure of their officers or agents either to enact ordinances, or to enforce them after they are enacted,² or for damages that may be caused by their enforcement;³ nor for their failure to abate private nuisances;⁴ nor for their omission to provide or maintain sufficient reservoirs or apparatus for fire extinguishing purposes;⁵ nor yet for a failure to construct roads, sewers, or other municipal improvements, or for damages resulting from the plan of such improvements.⁶

¹ § 6, *ante*.

² *Carroll v. St. Louis*, 4 Mo. App. 191 (1877); *Griffin v. Mayor, etc. of New York*, 9 N. Y. 456 (1853); *Hill v. Charlotte*, 72 N. C. 55 (1875); *Western College of Medicine v. Cleveland*, 12 Oh. St. 375 (1861).

³ *Trammell v. Russellville*, 34 Ark. 105 (1879).

⁴ *Davis v. Montgomery*, 51 Ala. 139 (1874); *Cain v. Syracuse*, 95 N. Y. 83 (1883); *McDade v. Chester*, 117 Pa. St. 414 (1887), (12 Atl. Rep. 421), and cases cited under § 6, *ante*.

⁵ *Brinkmeyer v. Evansville*, 29 Ind. 187 (1867); *Tainter v. Worcester*, 123 Mass. 311 (1877); *Grant v. Erie*, 69 Pa. St. 420 (1871), and cases cited under § 6, *ante*.

⁶ *Van Pelt v. Davenport*, 42 Ia. 308 (1875); *Child v. Boston*, 4 Allen (Mass.), 41, 51 (1862); *Wilson v. Mayor, etc. of New York*, 1 Den. (N. Y.) 595 (1845); *Cole v. Medina*, 27 Barb. (N. Y.) 218 (1845); *Dayton v. Pease*, 4 Oh. St. 80 (1854); *Carr v. Northern Liberties*, 35 Pa. St. 324 (1860), and cases cited under § 6, *ante*.

In *Wilson v. Mayor, etc. of New York*, 1 Den. (N. Y.) 595 (1845), Mr. Justice Beardsley says, at page 599: "Where the duty alleged to have been violated is purely judicial, a different rule prevails; for no action lies in any case, for misconduct or delinquency, however gross,

If, however, the officer or agent who is to perform duties of a legislative or judicial nature is chosen directly by the corporation, it is bound to exercise due care and diligence in order to select a man competent to perform the duties of the office. If it fails in its duty in this regard, it cannot shield itself behind the above rule, but will be required to respond in damages for the injudicious acts of any incompetent officer whom it has negligently selected.¹

§ 19. Police Officers.—Municipal corporations are not, by virtue of any inherent power, conservators of the public peace. Whatever powers and duties they have in that direction are delegated to them by the sovereign power of the state. Usually, though of course not necessarily nor always, the appointment of police officers devolves upon them as a convenient mode of exercising a function of government; but when appointed, the powers and duties of such officers are derived from and defined by, not the corporations, but the common law and the acts of the legislature. “The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which police officers and constables are entrusted, are derived

in the performance of judicial duties. And although the officer may not in strictness be a judge, still, if his powers are discretionary, to be exerted or withheld, according to his own view of what is necessary and proper, they are in their nature judicial, and he is exempt from all responsibility by action for the motives which influence him, and the manner in which such duties are performed. If corrupt, he may be impeached or indicted, but the law will not tolerate an action to redress the individual wrong which may have been done.” And at page 600 he adds: “A mandamus will not lie to control the discretion of any tribunal or officer, nor is such tribunal or officer answerable in any form of action, for the manner in which any duty, of a judicial or discretionary nature, shall have been performed.”

¹ Rochester White Lead Co. v. Rochester, 3 N. Y. 463 (1850).

from the law, and not from the city or town under which they hold their appointment."¹ Such officers are thus plainly engaged in a purely public service — in the performance of strictly governmental duties. They cannot be considered in any sense as the servants or agents of the corporation. The rule has become well settled, therefore, that municipal corporations cannot be held responsible at common law for the negligent doings or for the misdoings of their police officers while engaged in the performance of their official duties as such officers.²

In accordance with this rule courts have held that they are not liable for an assault and battery committed by a member of their police force;³ nor for any unlawful arrest or false imprisonment;⁴ nor again for a failure of their

¹ Chief Justice Bigelow in *Buttrick v. Lowell*, 1 Allen (Mass.), 172, 173 (1861).

² *Campbell v. Montgomery*, 53 Ala. 527, 531 (1875); *Lafayette v. Timberlake*, 88 Ind. 330 (1882); *Pollock's Adm'r v. Louisville*, 13 Bush (Ky.), 221 (1877); *Elliott v. Philadelphia*, 75 Pa. St. 347 (1874); *Norristown v. Fitzpatrick*, 94 Pa. St. 121 (1880).

³ *McElroy v. Albany*, 65 Ga. 387 (1880); *Calwell v. Boone*, 51 Ia. 687 (1879), (2 N. W. Rep. 614); *Buttrick v. Lowell*, 1 Allen (Mass.), 172 (1861).

In *McElroy v. Albany*, 65 Ga. 387 (1880), it appeared that the officer seized the plaintiff and threw him down, inflicting serious bodily injury upon him; that the officer was at the time intoxicated and was not attempting to make an arrest. The court applied the general rule to the case, and held that the defendant corporation was not liable.

⁴ *Grumbine v. Washington*, 2 McArthur (D. C.), 578 (1876); *Cook v. Macon*, 54 Ga. 468 (1875); *Harris v. Atlanta*, 62 Ga. 290 (1879); *Attaway v. Cartersville*, 68 Ga. 740 (1882); *Odell v. Schroeder*, 58 Ill. 353 (1871); *Laurel v. Blue*, 1 Ind. App. 128 (1890), (27 N. E. Rep. 301); *Peters v. Lindsborg*, 40 Kan. 654 (1889), (20 Pac. Rep. 490); *Kelley v. Cook*, 21 R. I. 29 (1898), (41 Atl. Rep. 571); *Corsicana v. White*, 57 Tex. 382 (1882).

In the application of this rule, it makes no difference that the arrest was made without a warrant, *Attaway v. Cartersville*, 68 Ga. 740 (1882); *Coley v. Statesville*, 121 N. C. 301 (1897), (28 S. E. Rep.

police to protect the property of citizens;¹ nor for property negligently destroyed by the police themselves.²

The fact that the officer, at the time he did the tortious act, was engaged in the attempted enforcement of a city ordinance, and not of a general law, does not alter the above rule of immunity.³ "The authority to enact by-laws," says Chief Justice Bigelow in *Buttrick v. Lowell*,⁴

482); *Royce v. Salt Lake City*, 15 Utah, 401 (1897), (49 Pac. Rep. 290); nor that the arrest or imprisonment resulted from the enforcement of an invalid or unconstitutional ordinance, *Trammell v. Russellville*, 34 Ark. 105 (1879); *Easterly v. Irwin*, 99 Ia. 694 (1896), (68 N. W. Rep. 919); *Caldwell v. Prunelle*, 57 Kan. 511 (1896), (46 Pac. Rep. 949); *Taylor v. Owensboro*, 98 Ky. 271 (1895), (32 S. W. Rep. 948); *Trescott v. Waterloo*, 26 Fed. Rep. 592 (1895).

In *McFadin v. San Antonio*, 22 Tex. Civ. App. 140 (1899), (54 S. W. Rep. 48), it was held that a city was not answerable to a person for an injury to his reputation caused by his arrest, conviction, and imprisonment under a void ordinance. While in *Craig v. Charleston*, 180 Ill. 154 (1899), (54 N. E. Rep. 184), the defendant city was held not to be liable for the wrongful act of its mayor in appointing, as special policeman, a person whom he knew to be unfit for the office.

In *McGraw v. Marion*, 98 Ky. 673 (1896), (34 S. W. Rep. 18), the court held that the defendant city was answerable for the arrest and imprisonment of the plaintiff by its officers while engaged in enforcing a void and unconstitutional ordinance or by-law, which had been enacted and was being enforced for the sole benefit of the defendant city and of its citizens. And in *Johnson City v. Wolfe*, 103 Tenn. 277 (1899), (52 S. W. Rep. 991), it was held that while a municipal corporation was not liable for the personal torts committed by a policeman, yet if he acted under the direction of, or with the sanction of, the authorities, his acts become those of the corporation, for which it was responsible.

¹ *Prather v. Lexington*, 13 B. Monroe (Ky.), 559 (1852); *Hart v. Bridgeport*, 13 Blatchf. (U. S. C. C.) 289 (1876).

² *Dargan v. Mobile*, 31 Ala. 469 (1858); *Stewart v. New Orleans* 9 La. An. 461 (1854), in effect overruling *Johnson v. Municipality No. One*, 5 La. An. 100 (1850); *Elliott v. Philadelphia*, 75 Pa. St. 347 (1874).

³ *Buttrick v. Lowell*, 1 Allen (Mass.), 172, 174 (1861).

⁴ 1 Allen (Mass.), 172, 174 (1861).

"is delegated to the city by the sovereign power, and the exercise of the authority gives to such enactments the same force and effect as if they had been passed directly by the legislature. They are public laws of a local and limited operation, designed to secure good order and to provide for the welfare and comfort of the inhabitants. In their enforcement, therefore, police officers act in their public capacity, and not as the agents or servants of the ~~city~~."

And if it appears that the law or ordinance in the course of the enforcement of which the officer committed the tort was *ultra vires* and void, there is plainly no liability upon the municipal corporation, for here the additional defence of *ultra vires* is also available.¹

Not being liable in the first instance for the tortious acts of their police officers, municipal corporations cannot become liable by taking any steps in the case that might constitute a ratification of such officers' acts.²

¹ *Trammell v. Russellville*, 34 Ark. 105 (1879); *Worley v. Columbia*, 88 Mo. 106 (1885).

² *Calwell v. Boone*, 51 Ia. 687, 689 (1879), (2 N. W. Rep. 614); *Peters v. Lindsborg*, 40 Kan. 654 (1889), (20 Pac. Rep. 490); *Buttrick v. Lowell*, 1 Allen (Mass.), 172, 174 (1861); and see also *Odell v. Schroeder*, 58 Ill. 353 (1871). In the Massachusetts case it appeared that the defendant corporation authorized and employed its city solicitor to defend an action against one of its police officers for an assault and battery committed upon the plaintiff; that the plaintiff then brought suit against the defendant corporation upon the same facts. The court held that these matters did not constitute a ratification by the corporation of the tortious acts of the police officer so as to render it liable for them.

In *McKay v. Buffalo*, 9 Hun (N. Y.), 401 (1876), affirmed in 74 N. Y. 619 (1878), and *Whitfield v. Paris*, 84 Tex. 431 (1892), (19 S. W. Rep. 566), the corporation was held not liable for injuries due to the negligence of a policeman in shooting at a dog. And see to same point, *Culver v. Streator*, 130 Ill. 238 (1889), (22 N. E. Rep. 810).

Where it appeared that a policeman negligently propped up a trap

§ 20. Prison Officers. — The subject of personal liberty has always been considered to be a matter which was of concern to the public as a whole, and which it was the function of government to regulate and control. Consequently municipal corporations, while engaged in the performance of duties relative to imprisonment, act in a governmental capacity as the representatives of the state, and derive from such performance no private advantage or emolument. Prison officials are held, therefore, to be, not the servants or agents of the corporations, but public officers, engaged in a service owed to the whole community, for whose negligent or tortious acts the corporations themselves are not responsible at common law.¹

§ 21. Health and Hospital Officials. — The performance of duties that relate to the preservation of the public health and to the care of the indigent sick is likewise of concern to the public as a whole. These duties constitute, therefore, still another class of governmental duties which municipal corporations are bound, under the general laws and for the welfare of the whole community, to see performed, but in which they have no special interest and

door of a cellarway in a sidewalk before a police station, whereby a traveller was injured, the court held that the defendant corporation was liable, on the ground that the negligence was that of an agent of the city in respect to the care of the highway and in respect to the use of its own property. *Carrington v. St. Louis*, 89 Mo. 208 (1886), (1 S. W. Rep. 240).

¹ *Detroit v. Laughna*, 34 Mich. 402 (1876); *Doster v. Atlanta*, 72 Ga. 233 (1884). In this last case, the plaintiff, a convict, sued for an assault committed upon him by a fellow convict; the corporation was held not liable.

In *Johnson v. Municipality No. One*, 5 La. An. 100 (1850), the defendant corporation was held liable for the negligence of its prison officers by which plaintiff's slave, who had been confined in the prison, lost his life. This case was in effect overruled in *Stewart v. New Orleans*, 9 La. An. 461 (1854).

from which they derive no particular advantage in their corporate capacity. The corporate officers who are engaged in the performance of such duties are held, consequently, to be public officers, for whose negligent doings or misdoings municipal corporations are not responsible, unless expressly made so by statute.¹

¹ *Ogg v. Lansing*, 35 Ia. 495 (1872); *Brown v. Vinalhaven*, 65 Me. 402 (1876), where the defendant corporations were held not liable to persons infected with contagious disease by reason of the negligence of health officers in enforcing regulations intended to prevent the spread of such diseases; *Mitchell v. Rockland*, 52 Me. 118 (1860), where the defendant was held not liable for damages done to the plaintiff's vessel by the negligence of health officers while engaged in fumigating same; *Bryant v. St. Paul*, 33 Minn. 289 (1885), (23 N. W. Rep. 220), where the corporation was held not liable to a plaintiff who was injured by falling into a vault that was negligently left open by health officers; *Bamber v. Rochester*, 26 Hun (N. Y.), 587 (1882), in which the defendant corporation was held not liable for the value of infected rags which had been destroyed by order of health officers.

In *Murtaugh v. St. Louis*, 44 Mo. 479 (1869), *Richmond v. Long*, 17 Gratt. (Va.) 375 (1867), the defendant corporations were held not liable for the negligence or misconduct of the superintendent, nurses, and attendants of a hospital while caring for non-paying patients; and in *Sherbourne v. Yuba County*, 21 Cal. 113 (1862), and *Summers v. Daviess County*, 103 Ind. 262 (1885), (2 N. E. Rep. 725), the defendants were held not liable for the unskilfulness of a physician employed by them to treat the indigent sick.

See also *Tormey v. Mayor, etc. of New York*, 12 Hun (N. Y.), 542 (1878).

Overseers of the poor also are public officers, for whose acts municipal corporations are not responsible. *Spring v. Hyde Park*, 137 Mass. 554 (1884); *New Bedford v. Taunton*, 9 Allen (Mass.), 207 (1864).

This rule of immunity applies not only to the acts of such officers themselves, but as well to the acts of all those employed by them, regardless of the grade of the employee. This is, of course, necessary in order to maintain the integrity of the general doctrine. Thus, a corporation has been held not liable for the negligent acts of a driver of an ambulance while performing his duties as an employee of a board of public charities. *Maximilian v. Mayor, etc. of New*

§ 22. **Members of the Fire Department.**—It appears to be generally conceded that the preservation of property from destruction by fire is not a duty performed by municipal corporations for their own private advantage. Upon the broad principle of the interdependence of one community upon every other community, it is recognized that the performance of this duty interests and benefits the whole public. And furthermore, it is obvious that the corporations themselves derive no special gain or emolument from it, nor are immediately benefited by it in their corporate capacity. The duty is rather governmental in its nature, owed to the public, and performed for the public good. The rule has, thus, become well established that members of the fire department, when acting in the discharge of their duties, are not servants or agents in the employment of the corporation, for whose conduct it can be held liable; but they act as officers of the corporation, charged with the performance of a certain public duty or service; and no action at common law will lie against the corporation for their negligence or improper conduct, while acting in the discharge of their official duty.¹

In accordance with this rule it has been held that municipal corporations are not liable for personal injuries

York, 62 N. Y. 160 (1875). And so as to the negligent acts of a driver of a garbage wagon. *Condict v. Jersey City*, 46 N. J. L. 157 (1884).

¹ *Jewett v. New Haven*, 38 Conn. 368 (1871); *McKenna v. St. Louis*, 6 Mo. App. 320 (1878); *Wild v. Paterson*, 47 N. J. L. 406 (1885), (1 Atl. Rep. 490).

“An additional, if not more satisfactory reason,” says Mr. Justice Walker, in *Wilcox v. Chicago*, 107 Ill. 334, 339 (1883), for adopting the rule exempting municipal corporations from liability for the tortious acts of members of their fire departments, “may be found in public policy. . . . To allow recoveries for the negligence of the fire department would almost certainly subject property holders to as great, if not greater, burthens than are suffered from the damages from fire.”

caused by the negligence of members of their fire departments, while acting in the course of their official duty;¹ nor for the destruction of any property due to the defective condition or negligent use of fire apparatus.²

It makes no difference in this rule whether the fire department has been established and is regulated under a special act of the legislature that was voluntarily accepted by the corporation to which alone its terms applied;³ or whether it was voluntarily organized under a general law, the language of which was permissive in form and the terms of which left the entire control over the department to the corporation;⁴ or whether it was wholly a volunteer association with which the corporation had nothing to do, save to ratify its acts and to accept its services.⁵

¹ *Wilcox v. Chicago*, 107 Ill. 334 (1883); *Greenwood v. Louisville*, 13 Bush (Ky.), 226 (1877); *Fisher v. Boston*, 104 Mass. 87 (1870); *Alexander v. Vicksburg*, 68 Miss. 564 (1891), (10 So. Rep. 62); *O'Meara v. Mayor, etc. of New York*, 1 Daly (N. Y.), 425 (1865); *Smith v. Rochester*, 76 N. Y. 506 (1879); *Freeman v. Philadelphia*, 13 Phila. (Pa.) 151 (1879); *Kies v. Erie*, 135 Pa. St. 144 (1890), (19 Atl. Rep. 942); *Dodge v. Granger*, 17 R. I. 664 (1892), (24 Atl. Rep. 100); *Lawson v. Seattle*, 6 Wash. 184 (1893), (33 Pac. Rep. 347).

² *Torbush v. Norwich*, 38 Conn. 225 (1871); *Robinson v. Evansville*, 87 Ind. 334 (1882); *Grube v. St. Paul*, 34 Minn. 402 (1886), (26 N. W. Rep. 228); *Heller v. Sedalia*, 53 Mo. 159 (1873); *Wheeler v. Cincinnati*, 19 Oh. St. 19, 22 (1869); *Hayes v. Oshkosh*, 33 Wis. 314 (1873).

³ *Fisher v. Boston*, 104 Mass. 87, 94 (1870).

⁴ *Wilcox v. Chicago*, 107 Ill. 334 (1883).

⁵ *Torbush v. Norwich*, 38 Conn. 225 (1871).

In *Welsh v. Rutland*, 56 Vt. 228 (1883), the defendant was held not liable for negligence of the fire department in thawing out a hydrant, in consequence of which water collected in the street and froze, and the plaintiff fell thereon and was injured. In *Terhune v. Mayor, etc. of New York*, 88 N. Y. 247, 251 (1882), the corporation was held not liable for the acts of its fire commissioners in wrongfully dismissing the plaintiff from office. In *Thompson v. Mayor, etc. of New York*, 52 N. Y. Sup. Ct. 427 (1885), the corporation was held not liable for the negligence of its fire commissioners while

If the fire department was at the time of the accident engaged in the performance of a service of a private nature, such as taking part in a celebration, this fact will not render the corporation liable.¹ The reasoning upon which this conclusion is reached seems to be that the corporation either had, or had not, authority to employ its fire department in a service of such a nature. If it had the authority, then the department was acting within the scope of its duty, and the usual rule of immunity applies. If it had not the authority, then the corporation, in so employing it, was acting *ultra vires*, and on that ground could not be held liable.

§ 23. Tax Assessors and Collectors. — The assessment and collection of general taxes for the support of the government are strictly functions of government. Municipal corporations, while engaged in performing the duties growing out of these functions, act in their capacity as governmental agencies, and are discharging a public service which the state has delegated to them for con-

engaged in testing apparatus before purchasing same. In *Wild v. Paterson*, 47 N. J. L. 406 (1885), (1 Atl. Rep. 490), the defendant was held not liable to a member of its fire department for injuries due to a failure to keep its apparatus in proper condition. In *Burrill v. Augusta*, 78 Me. 118 (1886), (3 Atl. Rep. 177), the corporation was held not liable for the negligent management of its apparatus by the firemen, in consequence of which the plaintiff's horse became frightened and ran away.

¹ *Smith v. Rochester*, 76 N. Y. 506 (1879). And see also *Simon v. Atlanta*, 67 Ga. 618 (1881).

The fact that there is no alarm of fire, but that the firemen are practising with their apparatus in the streets in order to become more efficient, will not render the corporation liable for their negligence while so doing. *Thomas v. Findlay*, 6 Oh. C. C. 241 (1892).

This same rule of immunity applies to the negligences of a fire patrol, a corporation that is an auxiliary to the city government or to its fire department. *Boyd v. Insurance Patrol*, 113 Pa. St. 269 (1886), (6 Atl. Rep. 536).

venience. The officers by whom the actual work connected with the performance of these duties is done are, therefore, public officers, and not in any legal sense the agents or servants of the corporations themselves. Hence, the doctrine of *respondeat superior* is held to have no application to their acts. Thus, it has been decided that municipal corporations are not responsible at common law for the tortious acts of a city treasurer,¹ or of assessors or collectors of taxes,² while acting in the line of their duty as tax officers.

If, however, the tax in the course of the assessment or collection of which the tort is committed, is not for general governmental purposes, but is a special assessment of a local character, made for some municipal improvement in which the general public has no direct interest, the above rule does not apply. Thus, where a corporation laid out and opened a street, and assessed the benefits therefrom upon the abutters but failed to do so in the proper manner, and the plaintiff's property was seized and sold under this void assessment, it was held that the collection of an assessment of this nature was a strictly municipal function, and the officers by whom it was dis-

¹ Wallace *v.* Menasha, 48 Wis. 79 (1879), (4 N. W. Rep. 101).

² Liberty *v.* Hurd, 74 Me. 101 (1882); Alger *v.* Easton, 119 Mass. 77 (1875); Dunbar *v.* Boston, 112 Mass. 75 (1873); Rossire *v.* Boston, 4 Allen (Mass.), 57 (1862); Lorillard *v.* Monroe, 11 N. Y. 392 (1854).

Where a warrant was issued to a constable, directing him to collect from the persons named in a schedule annexed and upon the assessment and tax-roll of a certain ward, the several sums opposite to their names, and the constable seized property belonging to the plaintiff, whose name did not appear upon either list, the court held, in an action for conversion, that the corporation was not liable. The decision here was placed on the ground that the tortious taking by the constable was neither authorized by it in the beginning nor subsequently ratified. Being a wholly unauthorized act, the corporation could not be made responsible for it. Everson *v.* Syracuse, 100 N. Y. 577 (1885), (3 N. E. Rep. 784).

charged were performing a municipal or corporate, and not a public or governmental, duty; and hence that the corporation was liable for their tortious acts done in the course of its performance.¹

§ 24. Officers engaged in performing Private Duties. — When municipal corporations undertake to perform duties

¹ Durkee *v.* Kenosha, 59 Wis. 123 (1883), (17 N. W. Rep. 677).

Surveyors of Highways and Street Commissioners. — Such officers in the New England States, at least where they are appointed under general statutes in which their duties are prescribed, are commonly held to be public officers, and not the agents or servants of the municipal corporations from whom they receive their appointment. The principle of *respondeat superior* is held, therefore, not to apply to their official acts. Judge *v.* Meriden, 38 Conn. 90 (1871); Woodcock *v.* Calais, 66 Me. 234 (1877); Walcott *v.* Swamscott, 1 Allen (Mass.), 101 (1861); Barney *v.* Lowell, 98 Mass. 570 (1868); Clark *v.* Easton, 146 Mass. 43 (1888), (14 N. E. Rep. 795); Ball *v.* Winchester, 32 N. H. 435 (1855). *Contra*, Kobs *v.* Minneapolis, 22 Minn. 159 (1875); Inman *v.* Tripp, 11 R. I. 520, 527 (1877).

In Woodcock *v.* Calais, 66 Me. 234 (1877), it appeared that the street commissioner did the act complained of under an express order from the city government; the court held that the general rule of immunity for the acts of such an officer did not apply to this case, but having expressly authorized the act, the corporation was liable.

Where it appeared that the city ordinances required the engineer of the corporation to give information to private individuals as to the established grade of streets, and that a fee was charged for this service; that the engineer by mistake incorrectly informed the plaintiff as to the established grade of the street adjacent to his lot, in consequence of which damage resulted to him, it was held that the corporation was not liable, on the ground that the benefit from this service of the engineer accrued solely to the individual, and not to the city in its corporate capacity. Waller *v.* Dubuque, 69 Ia. 541 (1886), (29 N. W. Rep. 456).

Public Celebrations. — The celebration of a holiday, when undertaken by a municipal corporation exclusively for the gratuitous amusement and instruction of the public, under the authority of a general law which is applicable to all such corporations alike, does not render it liable to an action by an individual who was injured through the negligence of those who have charge of the celebration. Tindley *v.* Salem, 137 Mass. 171 (1884); and see Morrison *v.* Lawrence, 98 Mass. 219 (1867).

of a private nature, for their own special interest and advantage, and not for the public welfare, they stand on another footing. In the discharge of such duties, as a matter of law, they occupy the same position as private corporations or natural individuals. They appoint their own officers for the performance of these duties, and retain control and supervision over them. Such officers are, therefore, not public officers, but strictly the servants or agents of the corporations themselves. In such cases, consequently, the maxim *respondeat superior* has a direct application, and municipal corporations are held liable for the negligent or tortious acts of the officers or agents who are engaged in the discharge of duties of this character, while acting within the scope of their employment.¹

¹ Chicago *v.* Dermody, 61 Ill. 431 (1871); Shinkle *v.* Covington 1 Bush (Ky.), 617 (1866); Fennimore *v.* New Orleans, 20 La. An. 124 (1868); Perry *v.* Worcester, 6 Gray (Mass.), 544 (1856); Worden *v.* New Bedford, 131 Mass. 23 (1881); Waldron *v.* Haverhill, 143 Mass. 582 (1887), (10 N. E. Rep. 481); Mayor, etc. of New York *v.* Bailey, 2 Den. (N. Y.) 433 (1845); Pittsburg *v.* Grier, 22 Pa. St. 54 (1853); Memphis *v.* Lasser, 9 Humph. (Tenn.) 757 (1849), and cases cited under §§ 25, 26, *post*. And see Alcorn *v.* Philadelphia, 5 Phila. (Pa.) 130 (1863); s. c. 44 Pa. St. 348 (1863), where the defendant corporation was held not liable for the negligence of its surveyor, though the duty which he was performing at the time was considered to be a private duty.

Where a municipal corporation authorized a contractor to lay a sewer in one of its streets, and in the course of the work the contractor made use of certain processes that were covered by patents owned by the plaintiff, it was held, in an action to recover damages for the infringement of those patents, that since the work of laying the sewer was a private one done for the benefit of the corporation, it was liable in this action, just as a private person or corporation would be in like circumstances. Asbertine Tiling, etc. Co. *v.* Hepp, 39 Fed. Rep. 324 (1889).

In Worden *v.* New Bedford, 131 Mass. 23 (1881), it appeared that the defendant let for profit a room in its city hall to a certain association, which used it for the purpose of giving an exhibition; that the sum paid for its use included the janitor's services; that the plaintiff,

§ 25. Officers and Agents performing Ministerial Duties
— **Positive Statutory Duties.** — Whenever municipal corporations undertake the construction of any improvement for their own private interest and from which they derive directly or indirectly some advantage in their corporate capacity, and have gone so far as to adopt the plan of such improvement, the actual work of carrying that plan into execution is a duty purely ministerial in character. It is well settled that in the performance of such a duty they occupy exactly the same position as any legal individual. The officers and agents who have the work in charge act directly for them, are subject to their immediate control, and are in every sense their agents and servants. Municipal corporations are, therefore, responsible for the negligence and unskilfulness of those officers and agents who are engaged in the discharge of such duties in the same manner and to the same extent as a private corporation or natural person would be under like circumstances. Thus, they have been held liable for the negligence of those officers and agents who were engaged at the time in the work of constructing or repairing culverts, drains, and sewers;¹

rightfully on the premises by invitation of the hirer, was injured through the negligence of the janitor while performing his duties. The court held that since the injury was due to the negligence of a person who must be regarded as an agent of the corporation, in the performance of a duty undertaken by the corporation for profit, it was liable in this action.

¹ *Ross v. Madison*, 1 Ind. 281 (1848); *Wallace v. Muscatine*, 4 Greene (Ia.), 373 (1854); *Murphy v. Lowell*, 124 Mass. 564 (1878); *Lloyd v. Mayor*, etc. of New York, 5 N. Y. 369 (1851).

In *Semple v. Vicksburg*, 62 Miss. 63 (1884), it appeared that the defendant corporation employed an agent to close certain inlets to its sewers; that he negligently closed one not included in his orders. In an action to recover damages therefor, it was held that the defendant was liable, on the ground that the negligent act was done while its agent was engaged in a purely ministerial duty connected with its sewers.

or who were engaged at the time in constructing or repairing streets and highways.¹

And if a duty expressly imposed upon a municipal corporation is neglected by the officers or agents charged with its performance, the corporation is bound to respond in damages for such negligence. Thus, where the duty to collect assessments levied to compensate property owners for damages sustained by reason of the opening of new streets was expressly imposed by statute upon the corporation, and the municipal authorities charged with its performance failed to do it, the corporation was held liable for their negligence.²

§ 26. Commissioners of Water-works. — The duty of constructing and maintaining water-works is not governmental in character, though the ultimate result of its performance may be for the public good. The state in its sovereign character does not impose, nor have any interest in, a duty of this character. On the contrary it grows out of a grant of a special franchise made for the private advantage and emolument of those municipal corporations which may undertake its exercise. The officers and agents charged with the construction and maintenance of such works stand fully in the relation of master and servant to the corporations. The principle seems to be well

¹ *Cotes v. Davenport*, 9 Ia. 227 (1859); *Templin v. Iowa City*, 14 Ia. 59 (1862); *Lacour v. Mayor, etc. of New York*, 3 Duer (N. Y.), 406 (1854); *Dayton v. Pease*, 4 Oh. St. 80 (1854).

Where the defendant corporation employed workmen to lay gas pipes in its streets, and by the negligence of one of those workmen while engaged in the performance of his duty, a piece of metal flew into the plaintiff's eye, greatly injuring his sight, it was held that the corporation was liable for his negligence. *Scott v. Manchester*, 1 H. & N. 59 (1856).

² *Clayburgh v. Chicago*, 25 Ill. 535 (1861), and see *Mayor, etc. of New York v. Furze*, 3 Hill (N. Y.), 612, 618 (1842).

established, therefore, that municipal corporations must respond in damages for the negligence and unskillfulness of their water commissioners, and of the subordinate employees of such commissioners, while acting in the course of their employment.¹

§ 27. Trespass. — That municipal corporations may be liable for a trespass committed by their officers or agents, can admit of little question.² Whatever disagreement there may be in the decisions upon this subject appears to arise from the difficulty in determining the circumstances under which the liability is to be enforced, rather than in determining whether there is any such liability at all. The cases substantially agree that municipal corporations

¹ *Grimes v. Keene*, 52 N. H. 330, 335 (1872); *Bailey v. Mayor, etc. of New York*, 3 Hill (N. Y.), 531 (1842); *Mayor, etc. of New York v. Bailey*, 2 Den. (N. Y.) 433 (1845); *Ironton v. Kelley*, 38 Oh. St. 50 (1882); *Esberg Cigar Co. v. Portland*, 34 Oreg. 282 (1899), (55 Pac. Rep. 961); *Harrisburg v. Saylor*, 87 Pa. St. 216 (1878); *Aldrich v. Tripp*, 11 R. I. 141 (1875).

In *Norman v. Ince*, 8 Okl. 412 (1899), (58 Pac. Rep. 632), the defendant corporation was held to be liable for injuries done to the premises of the plaintiff by the constant discharge thereon of water from a water-tower built on its own land, said discharge being due to the negligent construction of the tower.

² “There is no doubt but that an action of tort may be maintained against a town or city to recover damages for a trespass committed by any of its agents or officers acting under its authority, or in pursuance of directions given them, upon the property or estate of another.” Mr. Justice Merrick, in *Hildreth v. Lowell*, 11 Gray (Mass.), 345, 349 (1858). “The doctrine is entirely untenable that there can be no municipal liability for unlawful acts done by municipal authorities to the prejudice of private parties. In this respect, public corporations are as distinctly legal persons as private corporations. . . . When the act done is in law a corporate act, there is no ground upon reason or authority for holding that if there is any legal liability at all arising out of it, the corporation may not be answerable. There is no conflict whatever in the authorities on this head.” Mr. Justice Campbell, in *Sheldon v. Kalamazoo*, 24 Mich. 383, 385 (1872).

are not responsible for all the trespasses of their officers or agents.¹ Thus, they are not liable if the acts constituting the trespass were done without authority and have never been ratified;² or if they were done by an officer who was at the time a public officer, engaged in the performance of a public duty.³

If, however, the trespass was expressly authorized by, or was subsequently ratified by, the corporation by competent authority, and the officers or agents by whom it was committed were its agents or servants, and not public officers, it will be liable for the wrong to the same extent as a private corporation in a like state of facts.⁴ And it seems to be settled also that a municipal corporation may be liable if the acts constituting the trespass were committed by one of its agents or servants while acting within the general scope of his official duties, and without any express authorization.⁵

¹ But see dissenting opinion of Chief Justice Appleton, in Cumberland, etc. Canal Co. v. Portland, 62 Me. 504 (1871), where it is maintained that a municipal corporation cannot be liable for trespass at all.

² Chicago v. McGraw, 75 Ill. 566 (1874); Elliott v. Philadelphia, 75 Pa. St. 347 (1874).

³ Manners v. Haverhill, 135 Mass. 165 (1883); Clark v. Easton, 146 Mass. 43 (1888), (14 N. E. Rep. 795).

⁴ Pontchartrain R. Co. v. New Orleans, 27 La. An. 162 (1875); Small v. Danville, 51 Me. 359 (1864); Cumberland, etc. Canal Co. v. Portland, 62 Me. 504 (1871); Woodcock v. Calais, 66 Me. 234 (1877); Hildreth v. Lowell, 11 Gray (Mass.), 345 (1858); Sheldon v. Kalamazoo, 24 Mich. 383 (1872); Hunt v. Boonville, 65 Mo. 620 (1877). *Contra*, Rowland v. Gallatin, 75 Mo. 134 (1881); Hanvey v. Rochester, 35 Barb. (N. Y.) 177 (1861).

In School District v. Williams, 38 Ark. 454 (1882), the defendant, a quasi corporation, was held not liable for trespass in seizing the plaintiff's property.

⁵ Quinn v. Paterson, 27 N. J. L. 35 (1858); Lee v. Sandy Hill, 40 N. Y. 442 (1869).

It has been held also that if the corporation has the power to do the work in the course of which the trespass was committed, it will be

§ 28. **Interference with Easements.**—The same rule of liability applies also where municipal corporations have, by their officers or agents, interfered with the enjoyment of a natural easement. If the tortious acts of their officers or agents were neither originally authorized, nor subsequently ratified, nor done in the course of the performance of their official duties and within the general scope of their employment, the corporations are not responsible.¹ But if the acts were authorized in the beginning, or were ratified after they were done, municipal corporations will be liable if a private person would be under the same circumstances.² And it seems that if the acts were done in the general course of the employment of the officers or agents authorized to act on the subject in question, and were done in good faith, the corporation will be liable. Thus, where street commissioners, while engaged in repairing the streets, took gravel from land owned by the

liable, even though that power was not regularly exercised. *Walling v. Shreveport*, 5 La. An. 660 (1850).

In *Reed v. Allegheny*, 79 Pa. St. 300 (1875), the defendant corporation was held not liable for a trespass committed by an independent contractor.

Likewise a municipal corporation may be liable for deceit. In *Sharp v. Mayor, etc. of New York*, 40 Barb. (N. Y.) 256 (1863), it was held that the defendant, having power to lease a slip, could authorize its agents to do it, and if they made false representations in the course of the negotiations, it was responsible. The rule was applicable, also, to municipal corporations that "the principal is liable for the false representations of the agent made in and about the matter for which he was appointed agent, not on the ground of express authority, given to the agent to make the statement, but on the ground that as to the particular matter for which the agent is appointed he stands in the place of the principal, and whatever he does or says in and about that matter is the act and declaration of the principal; for which the principal is just as liable as if he had personally done the act or made the declaration."

¹ *Thayer v. Boston*, 19 Pick. (Mass.) 511 (1837).

² See *Perry v. Worcester*, 6 Gray (Mass.), 544 (1856).

defendant corporation, and in so doing rendered impassable a way over which the plaintiff had an easement, it was held that since the acts were done for the benefit of the defendant in the general course of the duties of the commissioners, who acted in good faith, they were to be regarded as the agents of the corporation, even in the excesses they committed, and it was therefore liable.¹

§ 29. The Liability for the Acts of Independent Contractors. — The liability of municipal corporations for the negligent or otherwise tortious acts of an independent contractor employed by them is in general to be determined upon exactly the same principles as the liability of a private person in the same state of facts. The rule seems to be fully established that if such corporations make a contract for a completed work, to be paid for as such, leaving to the discretion of the contractor the manner in which the labor shall be performed and the selection and control of the men to be employed, the relation of principal and agent, or master and servant, is not created between them, and therefore the corporations are not responsible for the negligent doings or wrong doings of such contractor or of his employees.²

This rule applies even though, by the terms of the contract, the work is to be done "under the direction and to the entire satisfaction" of certain specified officers of the corporation. Such a provision, it is held, gives to the

¹ *Sprague v. Tripp*, 13 R. I. 38 (1880). In that case the court says, however, that the question is not free from difficulty, but that the conclusion there reached is on the whole sound.

² *East St. Louis v. Giblin*, 3 Ill. App. 219 (1878); *Pack v. Mayor, etc. of New York*, 8 N. Y. 222 (1853); *Kelly v. Same*, 11 N. Y. 432 (1854); *Treadwell v. Same*, 1 Daly (N. Y.), 123 (1861); *Herrington v. Lansingburg*, 36 Hun (N. Y.), 598 (1885); *Painter v. Pittsburg*, 46 Pa. St. 213 (1863); *Reed v. Allegheny*, 79 Pa. St. 300 (1875); *Harper v. Milwaukee*, 30 Wis. 365 (1872).

corporation only the right to prescribe what is to be done, and not the right to determine how it is to be done nor the right to select or control the men employed on the work, without which rights the relation of principal and agent, or of master and servant, cannot arise.¹

Nor does it alter this rule of immunity that the contractor was notoriously incompetent and unskilful, unless it further appears that the corporation, at the time when it employed him, knew of such incompetency and unskilfulness, or that it was guilty of negligence in making the contract with him.²

If, however, by the terms of the contract, the municipality retains control over the manner of doing the work and the men employed by the contractor, the relation of master and servant arises between them, and it will be liable for his tortious acts and for those of his employees.³ The maxim *respondeat superior* applies in such cases. And, furthermore, when the injury complained of results, not from any negligence or wrong doing on the part of the contractor or of his employees, but directly from the work required by the contract to be done, the corporation will, it seems, be responsible for such injury. Thus, where a city employed a contractor to raise the grade of a certain street, and the latter, in order to fulfil his contract, was required to, and did, dump a large quantity of gravel upon the plaintiff's land, it was held that the city was liable for the damage so done, although the acts causing the damage were done by a person engaged in an independent employment.⁴

¹ *Barry v. St. Louis*, 17 Mo. 121 (1852); *Kelly v. Mayor, etc. of New York*, 11 N. Y. 432 (1854).

² *Kelley v. Mayor, etc. of New York*, 4 E. D. Smith (N. Y.), 291 (1855).

³ *Chicago v. Joney*, 60 Ill. 383 (1871); *Chicago v. Dermody*, 61 Ill. 431 (1871). But see *Erie v. Caulkins*, 85 Pa. St. 247 (1877).

⁴ *Broadwell v. Kansas City*, 75 Mo. 213 (1881); *Pearson v. Zable*,

Moreover, the employment of an independent contractor to construct a public improvement in their streets does not in any degree relieve municipal corporations from the duty of keeping such streets in a safe condition for travel. They will be liable, therefore, for any damages due to defects therein, even though such defects were occasioned by the negligence of the contractor or of his employees.¹

§ 30. The Fellow Servant Doctrine.—The defence of common employment is open to municipal corporations, as to any other employer, whenever it appears that both the negligent employee and the injured employee were their servants and were engaged in a common employment. Thus, where the plaintiff, a workman, was injured while engaged in laying water pipes, through the negligence of the superintendent in charge of the work, it was held that the plaintiff and the superintendent were fellow servants, and the defendant city was not, therefore, liable in this action.² So where the plaintiff, an employee of the city, working under the orders of the superintendent of a cemetery, was injured by the negligence of the latter, the court

78 Ky. 170, 174 (1879); *Sewall v. St. Paul*, 20 Minn. 511, 523 (1874).

In *Vanderslice v. Philadelphia*, 103 Pa. St. 102, 110 (1883), it was held that the fact that the defendant city had employed a contractor to remove a nuisance, did not deprive the plaintiff from recovering for the damages occasioned by the continuance of the injury after the employment of such contractor and until it was abated. "There is some difference between the case where the contractor's negligence causes injury, and the case where a contractor is employed to remove a nuisance which continually increases the extent of an injury until abated. An independent contractor is liable for his own wrongful acts which damage another; but not for the direct consequences of the negligence of his employer."

¹ *Logansport v. Dick*, 70 Ind. 65 (1880); *Hawhurst v. Mayor, etc. of New York*, 43 Hun (N. Y.), 588 (1887).

² *McDermott v. Boston*, 133 Mass. 349 (1882); *Flynn v. Salem*, 134 Mass. 351 (1883).

held that the fellow servant doctrine applied and the defendant city was not liable.¹

But if the injured employee was at the time of the accident a public officer, engaged in a public service, and therefore not the agent or servant of the defendant corporation, it cannot avail itself of the defence of common employment.² This is doubly true where the injured agent or servant and the negligent agent or servant were engaged in different departments of corporate activity. Thus, where the plaintiff, a fireman, was injured while engaged in the performance of his duty, by reason of an obstruction in the highway which the officers and agents of the corporation who were intrusted with the care of the highways had neglected to remove, it was held that the defendant city could not shield itself behind the defence afforded by the fellow servant doctrine.³ The decision in that case was placed on the double ground that the members of the fire department and the members of the street department were not engaged in a common service; and that the injured member of the fire department was engaged in a public service, and the relation of master and servant did not for that reason exist between the corporation and himself.

¹ *Toledo v. Cone*, 41 Oh. St. 149 (1884).

² See *Wild v. Paterson*, 47 N. J. L. 406 (1885), (1 Atl. Rep. 490).

³ *Coots v. Detroit*, 75 Mich. 628 (1889), (43 N. W. Rep. 17). For similar cases where the same result was reached, see *Turner v. Indianapolis*, 96 Ind. 51, 54 (1884); *Palmer v. Portsmouth*, 43 N. H. 265 (1861).

In a dissenting opinion in the case of *Coots v. Detroit*, 75 Mich. 628 (1889), (43 N. W. Rep. 17), Mr. Justice Campbell holds that each department of corporate activity and the members of each, while acting in the performance of their duty, are working in one common work.

Licensees. Ordinarily a municipal corporation is not liable for the tortious acts of its licensees, unless it can be shown that they were authorized to perform an act dangerous in itself. *Wheeler v. Plymouth*, 116 Ind. 158, 159 (1888), (18 N. E. Rep. 532); and see § 113, *post*.

CHAPTER IV.

THE LIABILITY AS A PROPERTY OWNER.

§ 31. **Municipal Corporations as Property Owners.**—In dealing with the subject relating to the liability of municipal corporations growing out of their ownership of property, as in dealing with other subjects relating to public corporations, the fact that they have a double character must be kept distinctly in mind. For whatever differences there are between their liabilities as property owners and those of private corporations, or of private persons who own and deal with property, are directly due to this fact; and from it arise whatever peculiar immunities they enjoy. The property which they hold and use purely in their character as public governmental agencies stands in a distinct class, and to it the ordinary liabilities of ownership do not attach. In any particular case, then, the first consideration is: was the property in question held and used at the time of the accident for purely public and governmental purposes, or simply for private and municipal purposes. It may fairly be stated as a broad general proposition that according as this consideration is determined, the immunity or the liability of the corporation in the case in hand will be fixed.

§ 32. **The holding of Property in their Public Capacity.**—The general rule that municipal corporations are not liable for negligent or tortious acts done in the performance of those public, governmental duties that are imposed upon them all alike without their assent, extends also to

their negligent and tortious acts done in the management of that property which they hold and use for purely public purposes. This extension of the rule is based upon the consideration that they themselves derive from such property no gain or profit in their private capacity, but hold and deal with it for the direct and immediate benefit of the public, using it simply as a means for the better performance of the duties that the legislature has imposed upon them for the common good.¹

§ 33. The holding of Property in their Private Capacity
— *Sic utere tuo non laedas alieno.* — Municipal corporations as owners and occupiers of lands and buildings in their private character are regarded in the same light as private owners and occupiers. That familiar injunction which the common law addresses to proprietors of real estate, “so use your own as not to injure another,” applies

¹ *Hill v. Boston*, 122 Mass. 344 (1877); *Eastman v. Meredith*, 36 N. H. 284 (1858).

In *Curran v. Boston*, 151 Mass. 505 (1890), (24 N. E. Rep. 781), it appeared that the plaintiff, an inmate of the defendant's house of industry, was injured by reason of the negligence of those agents who had charge of the affairs of said institution. It was held that the “action of the city in establishing the workhouse was purely for the public service, and for the general good in providing for the care and support of offenders for whose maintenance it was responsible.” The fact that the city acted under a permissive statute in establishing this institution made no difference, since it derived no corporate advantage or pecuniary profit from the ownership or management of the property. Nor did the fact that some revenue was derived from the labor of the inmates alter the case. Though the statute required the inmates to be kept at work, the institution was not conducted with a view to pecuniary profit; whatever of that there was, was purely incidental.

In *Hill v. Boston*, 122 Mass. 344 (1877), the defendant city was held not liable for injuries suffered by a child while attending a public school in a schoolhouse provided by it in obedience to general laws, said injuries resulting from the unsafe condition of the staircase in the schoolhouse, over which the child was attempting to pass.

in the same manner and to the same extent to them, so far as they hold and use property for their own private advantage and emolument, as to any individual owner. In short, as to property so held and used by them, they stand on a footing of strict equality with private owners; neither of them is a privileged owner, but both must fulfil all those duties which grow out of, and attach to, the private ownership of property.¹ The rule is well settled, therefore, that "where a municipal corporation holds or deals with property as its own, not for the direct and immediate use of the public, but for its own benefit, by receiving rents or otherwise, in the same way as a private owner might, it is liable to the same extent as he would be, for the negligent management thereof to the injury of others."²

¹ See *Brower v. Mayor, etc. of New York*, 3 Barb. (N. Y.) 254 (1848). In this case it was held that the defendant city had no more right to erect and maintain a nuisance on its lands, although no private gain was derived therefrom, than a private person.

² *Oliver v. Worcester*, 102 Mass. 489 (1869); *Wilson v. New Bedford*, 108 Mass. 261 (1871); *Hill v. Boston*, 122 Mass. 344, 359 (1877); *Shunter v. Philadelphia*, 3 Phila. (Pa.) 228 (1858), and cases cited in following sections.

In *Cowley v. Sunderland*, 6 H. & N. 565 (1861), it appeared that the defendant corporation, acting under the provisions of a statute, had erected a washhouse; that the plaintiff, who had paid for the privilege of washing there, was injured by reason of the negligent construction of a drying machine which she was using. It was held that since the defendant had availed itself of the power given by the statute to erect such houses, it was bound to use ordinary care and diligence in its management, and to provide machines reasonably safe for use, and was therefore liable in this action.

Premises dangerous to Children. — While as a general rule the law does not require a city which owns property in its private capacity to keep it in a safe condition for the benefit of trespassers, or of those who come upon it without invitation express or implied, and who merely seek their own pleasure or the gratification of their own curiosity, an exception to this rule is made in some jurisdictions in favor of children of tender years. Accordingly in those jurisdictions it is

§ 34. Municipal Corporations are not Insurers of the Condition of their Property. — It follows from what was said in the preceding section that municipal corporations do not insure their citizens against damage from property owned and used by them in their private capacity. They are bound simply to exercise reasonable care and diligence in the construction and maintenance of such property. If they have done this, and have been guilty of no misconduct, they have fulfilled their whole duty as property owners. Their responsibility as such owners can, therefore, be predicated only upon some negligence or misconduct on their part.¹

§ 35. The Liability as Owners of City or Town Halls. — Municipal corporations are not liable at common law to private citizens for injuries caused by any defect or want of repair in a city or town hall owned by them, or caused by the negligence of their agents in the management of such buildings, while they are using same solely for public purposes.² This is, of course, simply another application of the rule that they are not liable for the omission or neglect to perform those public duties that are imposed

held that a municipal corporation is liable for injuries suffered by a child of tender years while playing upon its premises, if such premises were left unguarded and in such a condition as to be an attraction to such a child, and to appeal to his childish curiosity and instincts. *Pekin v. McMahon*, 154 Ill. 141 (1895), (39 N. E. Rep. 484), and cases cited. But the corporation would not be liable in such a case if the attraction, namely, a body of water, was wholly upon private property and not near to the highway, even though such attraction was created by its negligence. *Omaha v. Bowman*, 52 Neb. 293 (1897), (72 N. W. Rep. 316); if, however, the body of water extended into the street and the child entered it therefrom, the city would be liable. *Bowman v. Omaha*, 59 Neb. 84 (1899), (80 N. W. Rep. 259).

¹ *Flori v. St. Louis*, 69 Mo. 341 (1879); *Ring v. Cohoes*, 77 N. Y. 88, 89 (1879); *Jenney v. Brooklyn*, 120 N. Y. 164 (1890), (24 N. E. Rep. 274).

² *Eastman v. Meredith*, 36 N. H. 284 (1858).

upon all such corporations alike without their assent, and from the performance of which they derive no gain or advantage in their private capacity.

But while they are engaged in the erection of such buildings, they are bound to exercise the same degree of care and skill as a private person engaged in a like undertaking. If, therefore, a person is injured by reason of the negligence or unskillfulness of those officers or agents who have charge of the work, the corporation will be liable. Thus, where the plaintiff, a workman in the employ of the contractor, was injured by the fall of the roof of a city hall which was in process of construction for the defendant corporation, and it appeared that the roof fell because of insufficient support, due to a departure from the plans adopted, which the defendant's officers who had charge of the work negligently permitted, it was held that the city was liable for the injuries so sustained.¹

And, furthermore, if after such buildings are constructed such corporation does not devote them exclusively to municipal purposes, but lets them, or a part of them, for its own advantage and emolument, it is liable for any injuries due to the defective condition or the negligent management of them by the municipal agents. In all such cases it is dealing with its city hall, not in the discharge of a public duty, but for its own profit in a private enterprise, just as any private owner might, and is therefore liable in the same way and to the same extent as such private owner would be.² Thus where it appeared that the defendant city let a room in its city hall to an association for an exhibition; that the sum paid as

¹ *Chicago v. Dermody*, 61 Ill. 431 (1871). *Accord: McCaughey v. Tripp*, 12 R. I. 449 (1879).

² *Oliver v. Worcester*, 102 Mass. 489 (1869); *Worden v. New Bedford*, 131 Mass. 23 (1881).

rent therefor included the janitor's services; and that the plaintiff, who was rightfully on the premises by invitation of the hirers, was injured by falling through a trap door negligently left open by the janitor while performing his duties, it was held that, since the defendant was using that part of its city hall for private gain, it was responsible for this injury.¹

§ 36. The Liability as Owners of Market Places.—When municipal corporations enter upon the business of owning and letting for revenue stalls in a market, they assume exactly the same position as any owner of such property. For an enterprise of this nature is obviously private in character, conducted solely for their own private gain, and in which the public at large has no interest. They are liable, therefore, to the same extent as any landlord for injuries caused by any defects in such property due to negligence on their part.²

This rule does not, of course, require municipal corporations, in the construction and maintenance of such

¹ *Worden v. New Bedford*, 131 Mass. 23 (1881).

In that case it was also argued that the city had no power to let its public buildings for private uses, and therefore was not liable. But the court held that this ground was not tenable. "The city could not erect buildings for business or speculative purposes, but having a city hall, built in good faith and used for municipal purposes, it has the right to allow it to be used incidentally for other purposes, either gratuitously or for a compensation. Such a use is within its legal authority, and is common in most of our cities and towns." At page 24. On this point see also *French v. Quincy*, 3 Allen (Mass.), 9 (1861).

When the plaintiff was injured by stepping into a cellar-way of a building the upper story of which was under the control of the defendant corporation, but not the lower story or basement, it was held that the defendant was not liable as owner. *El Paso v. Causey*, 1 Ill. App. 531 (1877).

² *Savannah v. Cullens*, 38 Ga. 334, 346 (1868); *Lax v. Darlington*, L. R. 5 Ex. Div. 28 (1879).

property, to anticipate and guard against unusual and unprecedented occurrences. Thus, where the defendant's market-house was blown down during a wind-storm of unprecedented force and violence, and the plaintiff was injured in his person by its fall, it was held that the city was not liable, because there was no obligation resting upon it, in the construction and maintenance of this market-house, to anticipate such wind-storms; the utmost requirement that could be exacted would be that it should keep the building in such condition as would enable it to withstand the ordinary force and power of ordinary and usual wind-storms.¹

§ 37. The Liability as Owners of Wharves, Piers, or Docks. — When municipal corporations own and have in possession wharves, piers, or docks, over which they exercise exclusive control, and for the use of which they exact tolls, they are engaged in a private business undertaking. The duties involved in the management of such property by them are not in any proper sense public or governmental, but are private, and performed for their own private gain and emolument. The law, therefore, exacts from them as such owners just what it does from a private owner under like circumstances. They are bound to exercise reasonable care and skill in providing fastenings sufficient in number and strength to secure boats while lying alongside;² in providing proper string-pieces along

¹ *Flori v. St. Louis*, 69 Mo. 341 (1879).

² *Shinkle v. Covington*, 1 Bush (Ky.), 617 (1866); *Willey v. Allegheny*, 118 Pa. St. 490 (1888), (12 Atl. Rep. 453). In this last case the court says, at page 500, that reasonable care on the part of a municipal corporation under the circumstances requires "the use of all the appliances and precautions that a diligent man owning the rafts and owning the wharf would deem it proper to employ in the preservation of his own property from the perils of the river."

In *Jackson v. Allegheny*, 41 Fed. Rep. 886 (1890), it appeared that the plaintiff's boats were injured by reason of the defendant's failure to

the sides;¹ to anticipate and protect boats from the ordinary floods that occur at the particular place;² to keep the adjacent water in which boats lie moored free from obstructions.³ Hence the general rule is that municipal corporations are liable to any person injured by reason of the defective construction or want of repair of such property due to negligence on their part.⁴

provide sufficient fastenings; that the plaintiff had the exclusive occupancy of that portion of the wharf where his boats were tied up, paying a stipulated monthly sum therefor. It was held that the defendant was not liable for the damage, for the plaintiff was a lessee, and as such not entitled to that degree of care due to navigators who used the wharf in the ordinary way.

¹ *Kennedy v. Mayor, etc. of New York*, 73 N. Y. 365 (1878). In this case it appeared that while the plaintiff was backing on to the wharf, his horse suddenly became unmanageable and backed into the river; that the accident would not have happened but for the absence of a proper string-piece. The court held that the city's duty was not simply to furnish protection to animals that were docile and obedient. "The shying of a horse, his backing or turning in consequence of a sudden fright or other cause, so as to be for a moment beyond the control of the one having him in charge, are among the most common occurrences." The city was bound to guard against such occurrences, and having failed to do so, was liable for the plaintiff's loss, although his horse was not at the moment obedient to his will.

² *Shinkle v. Covington*, 1 Bush (Ky.), 617 (1866).

³ *Memphis v. Kimbrough*, 12 Heisk. (Tenn.) 133 (1873); *Petersburg v. Applegarth*, 28 Gratt. (Va.) 321 (1877). In this last case it appeared that the city did not, in the particular instance, receive any wharfage. The court held that this fact did not relieve it from liability. "It is sufficient that the city was entitled to make the charge."

⁴ *Fennimore v. New Orleans*, 20 La. An. 124 (1868); *McGuiness v. Mayor, etc. of New York*, 52 How. Pr. (N. Y.) 450 (1877); *Pittsburg v. Grier*, 22 Pa. St. 54 (1853); *Philadelphia, etc. R. Co. v. Mayor, etc. of New York*, 38 Fed. Rep. 159 (1889); *Mersey Docks Trustees v. Gibbs*, 11 H. L. Cas. 686 (1865).

Where a city leases its wharf, it is still liable for damages due to defects existing at the time of the letting, *Moody v. Mayor, etc. of New York*, 43 Barb. (N. Y.), 282 (1865); but, as a general rule, not for damages due to defects caused by the acts of its lessee, of which it has no notice, *Seaman v. Mayor, etc. of New York*, 80 N. Y. 239 (1880);

§ 38. **The Liability as Owners of Water-works.** — The owning of water-works and the furnishing of water by municipal corporations to their inhabitants for profit is likewise an undertaking of a purely private nature. As owners of such property, therefore, the same duties are exacted from them, and the same liabilities imposed upon them, as in the case of private corporations or individuals who are engaged in a similar enterprise. They are bound thus to exercise due care and skill in constructing and maintaining their reservoirs¹ and the entire

nor for damages due to defects occasioned by its lessee's failure to repair, unless the lease simply gave the right to collect wharfage and nothing more, *Taylor v. Mayor, etc. of New York*, 4 E. D. Smith (N. Y.), 559 (1855).

It has been held that if a person using a wharf knows that it is unsafe, and yet with that knowledge uses it and sustains loss, he is guilty of contributory negligence, and cannot recover damages for his loss. *Clancy v. Byrne*, 58 Barb. (N. Y.) 449 (1871). In *Pittsburg v. Grier*, 22 Pa. St. 54, 68 (1853), the court says on this point: "If we assume that both parties had equal opportunities of seeing and understanding the danger, they were not bound to equal degrees of vigilance. The city was held to the utmost care of the wharf; the owners of the boat only to that common prudence which would keep them clear of a manifest peril."

In *New York, etc. Co. v. Brooklyn*, 8 Hun (N. Y.), 37 (1876), it appeared that the duty to repair the wharf was imposed by special statute upon the common council and not upon the city. It was held that the city was not liable for the acts or omissions of the common council in respect to this duty.

¹ *Bailey v. Mayor, etc. of New York*, 3 Hill (N. Y.), 531 (1842); s. c. 2 Den. (N. Y.) 433 (1845). In the latter case the court says, at page 440: "The degree of care and foresight which it is necessary to use, in cases of this description, must always be in proportion to the nature and magnitude of the injury that will be likely to result from the occurrence which is to be anticipated and guarded against. And it should be that care and prudence which a discreet and cautious individual would or ought to use if the whole risk and loss were to be his own exclusively. Here the probable, if not the necessary, consequence of the carrying off of the city dam, by a flood, would be not only to sweep away the buildings and erections of all the owners of

apparatus by which the water is distributed.¹ But they are not insurers of the safe condition of such property, and consequently are not liable for any injuries that could not have been prevented by the exercise of due care and vigilance.²

property upon the Croton below such dam, but also to endanger the lives of such owners and of their families. The dam should, therefore, have been constructed in such a manner as to resist such extraordinary floods as might have been reasonably expected occasionally to occur."

¹ *Hand v. Brookline*, 126 Mass. 324 (1879); *McAvoy v. Mayor, etc. of New York*, 54 How. Pr. (N. Y.) 245 (1877); *Wilkins v. Rutland*, 61 Vt. 336 (1889), (17 Atl. Rep. 735).

This liability does not, of course, extend to damages occasioned by defects in the lateral service pipes, which are inserted in the main street pipes by, and are owned and controlled by, individual property owners. *Terry v. Mayor, etc. of New York*, 8 Bosw. (N. Y.) 504 (1861).

In *Aldrich v. Tripp*, 11 R. I. 141 (1875), the defendant city was held liable for the negligence of its agents in managing a hydrant connected with its water-works, in consequence of which the plaintiff's horse became frightened, ran away, and was injured.

Where it appeared that the defendant's servants, while engaged in constructing a sewer, negligently left exposed a water pipe which connected with the plaintiff's greenhouse; that in consequence of this exposure the water in the pipe froze, thus depriving the plaintiff of water for heating his greenhouse and for use on his plants, it was held that the defendant was liable for the damage so occasioned. *Stock v. Boston*, 149 Mass. 410 (1889), (21 N. E. Rep. 871).

For a case where the defendant city was held liable for negligence in the management of water furnished by it for the purpose of irrigation, see *Levy v. Salt Lake City*, 3 Utah, 63 (1881), (1 Pac. Rep. 160).

In *Wilson v. New Bedford*, 108 Mass. 261 (1871), it appeared that the defendant had constructed a reservoir near the plaintiff's premises and had accumulated water therein, which percolated through the soil, to the injury of the plaintiff's premises. The court held that since the city had collected a large body of water on its premises for purposes of its own, thereby obstructing the natural course of the water and causing it to percolate artificially to the plaintiff's premises, it was liable for the damage so done.

² *Moore v. Los Angeles*, 72 Cal. 287 (1887), (13 Pac. Rep. 855);

Cases of this class, where municipal corporations have been held liable for damages due to the defective condition of water-works owned and managed by them for profit, are to be distinguished, of course, from those cases where a plaintiff is attempting to recover damages for property destroyed by fire through the failure of the municipal authorities to keep the water-works in a proper condition. In the latter class of cases the common law imposes no liability upon public corporations, because in furnishing water-works for the protection of property from fire they are engaged in the exercise of a public, governmental function, from which they derive no advantage in their private capacity. And the fact that they also furnish water from the same works to private citizens for profit does not alter this result.¹

§ 39. The Liability as Owners of Gas-works. — When municipal corporations become owners of gas-works and engage in supplying gas to their inhabitants for profit, they undertake a private business enterprise, and of course become subject to all the liabilities which usually attach to an enterprise of that character.² As was said by the

Ring v. Cohoes, 77 N. Y. 83 (1879); *Jenney v. Brooklyn*, 120 N. Y. 164 (1890), (24 N. E. Rep. 274).

In *Danaher v. Brooklyn*, 119 N. Y. 241 (1890), (23 N. E. Rep. 745), it was held that the defendant city was not liable for injuries caused by the drinking of impure water from a free public well owned by it, where it did not appear either that there was a failure on its part to keep the well properly cleaned out, or that there was notice to it that the water therein had become impure, and where it did appear that there were no circumstances to arouse a suspicion as to the purity of the water, and that there was a sufficient supply of pure water furnished from other sources for the use of its inhabitants. This decision is placed upon the ground that its liability for the purity of the water furnished rested entirely upon negligence, and the facts disclosed none.

¹ *Mendel v. Wheeling*, 28 W. Va. 233 (1886), and cases cited on page 14, note 1.

² *Shuter v. Philadelphia*, 3 Phila. (Pa.) 228 (1858), where the de-

court in a Pennsylvania case:¹ "The supply of gaslight is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations. . . . If this power is granted to a borough or a city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city, as much so as the lands and houses belonging to it." Hence a city, while engaged in supplying gas to its citizens, stands upon the same footing as would any individual or private corporation engaged in a similar enterprise.

defendant city was held liable for injuries done to the plaintiff's well by the construction of a gas reservoir on its own premises, even though it appeared that its agents had exercised due care and skill in doing the work. *Scott v. Manchester*, 1 H. & N. 59 (1856), where the city was held liable to a plaintiff who was injured by the negligence of a workman employed by the defendant, and engaged at the time of the accident in the work of laying gas pipes.

¹ *Western, etc. Society v. Philadelphia*, 31 Pa. St. 175, 183 (1858).

CHAPTER V.

THE LIABILITY RELATIVE TO BRIDGES.

§ 40. **The Source of the Liability.**—By the common law of England, which was embodied in the statute 22 Hen. VIII. c. 5, and the subsequent bridge acts, counties were liable for the repair of public bridges and the approaches thereto.¹ This rule has, however, met with little approval from the courts of this country, and has become a part of its common law only to a very limited extent, if at all.² In America the liability of public corporations relative to bridges, as that relative to the highway of which they form a part, is either imposed specifically by statute,³ or arises out of the fact that the legislature has committed to them the exclusive care and control of the bridges within their territory, and has placed at their disposal the means to keep them in a safe condition.⁴

¹ *The King v. The West Riding of York*, 7 East, 588 (1806).

² *Hill v. Livingston County*, 12 N. Y. 52 (1854); *Tinkham v. Stockbridge*, 64 Vt. 480 (1892), (24 Atl. Rep. 761); *Washer v. Bullitt County*, 110 U. S. 558, 564 (1883), (4 S. Ct. Rep. 249).

³ *Whitman v. Groveland*, 131 Mass. 553 (1881); *Heigel v. Wichita County*, 84 Tex. 392 (1892), (19 S. W. Rep. 562); *Tyler v. Williston*, 62 Vt. 269 (1890), (20 Atl. Rep. 304).

⁴ *Howard County v. Legg*, 93 Ind. 523 (1883); *Soper v. Henry County*, 26 Ia. 264 (1868); *Shartle v. Minneapolis*, 17 Minn. 308 (1871); *Nebraska City v. Campbell*, 2 Black (U. S.), 590 (1862).

In Pennsylvania and Iowa, counties are held liable for damages due to defects in county bridges. *Humphreys v. Armstrong County*, 56 Pa. St. 204 (1868); *Westfield v. Tioga County*, 150 Pa. St. 152 (1892), (24 Atl. Rep. 700); *Wilson v. Jefferson County*, 13 Ia. 181

§ 41. For what Bridges Municipal Corporations are liable.—In order to fasten responsibility for injuries resulting from the defective condition of a bridge upon a municipal corporation, it must be made to appear that the bridge in question was one which the corporation was bound to repair.¹ To satisfy this burden, it must be shown either that the bridge was one which the corporation had itself constructed and opened for public travel, or that it was one which, though constructed and opened to the public by third persons, the corporation had duly taken under its control.² It has been held, furthermore, that it should appear that the bridge in question was one which the corporation had authority to build, since a municipal corporation is not responsible for the unsafe condition of a bridge which its officers had no authority to construct.³

In those states where counties are held liable for injuries due to the defective condition of county bridges, the plaintiff must show that the structure where the accident

(1862); *Huff v. Poweshiek County*, 60 Ia. 529 (1883), (15 N. W. Rep. 418). This was also the rule in Indiana. *House v. Board of Commissioners*, 60 Ind. 580 (1878); *Bonebrake v. Huntington County*, 141 Ind. 62 (1894), (40 N. E. Rep. 141). This doctrine has, however, been overruled by the Indiana court on the ground that counties are mere political divisions of the state, and as such are not liable to an action by a private individual. *Jasper County v. Allman*, 142 Ind. 573 (1895), 42 N. E. Rep. 206; *Johnson County v. Hemphill*, 14 Ind. App. 219 (1895), (42 N. E. Rep. 760).

¹ *Clark County v. Brod*, 3 Ind. App. 585 (1891), (29 N. E. Rep. 430); *Shelby County v. Blair*, 8 Ind. App. 574 (1893), (36 N. E. Rep. 216). In the latter case the court says, at page 580: "In an action against a county to recover for injuries received on account of a defective bridge, the facts alleged in the complaint, in order to be sufficient to withstand a demurrer, must show a duty resting upon the county and a breach of such duty."

² *Joliet v. Verley*, 35 Ill. 58 (1864); *Howard County v. Legg*, 93 Ind. 523, 528 (1883).

³ *Shelby County v. Deprez*, 87 Ind. 509 (1882); *Albany v. Cunliff*, 2 N. Y. 165 (1849).

happened comes within the definition of a county bridge.¹ If it does, what its size may be, and who paid the cost of its construction, are not material questions, so far as the liability of the corporation is concerned.²

§ 42. What constitutes a Bridge — Approaches. — A bridge does not consist merely of that structure of wood or iron, together with its abutments, which spans the stream. It also includes necessarily the approaches thereto. “The main structure, as it is called, being that part which spans the river, would be incomplete as a bridge without the so-called approaches. It would be utterly useless as a bridge, because totally inaccessible without the approaches, which are in fact a prolongation of the bridge, to enable persons travelling on the highway to cross the river on the bridge.”³

Municipal corporations are, therefore, as much bound to keep the approaches to a bridge in a safe condition for ordinary travel as the main structure itself, and are accordingly liable for any damages due to a defect or want of repair therein.⁴

¹ *Chandler v. Fremont County*, 42 Ia. 58 (1875). In that case Chief Justice Miller defined county bridges as follows: “County bridges are such only as require for their erection an extraordinary expenditure of money; such bridges as cannot be constructed with the limited means under the control of the respective road districts of the county, or such as have been constructed by the county.”

² *Howard County v. Legg*, 93 Ind. 523, 528 (1883); *Moreland v. Mitchell County*, 40 Ia. 394 (1875); *Albee v. Floyd County*, 46 Ia. 177 (1877); *Endora v. Miller*, 30 Kan. 494 (1883), (2 Pac. Rep. 685).

³ Chief Justice Miller in *Moreland v. Mitchell County*, 40 Ia. 394, 398 (1875).

⁴ *Augusta v. Hudson*, 94 Ga. 135 (1894), (21 S. E. Rep. 289); *Joliet v. Verley*, 35 Ill. 58 (1864); *Shelby County v. Deprez*, 87 Ind. 509. (1882); *Sullivan County v. Sisson*, 2 Ind. App. 311, 315 (1891), (28 N. E. Rep. 374); *Shelby County v. Blair*, 8 Ind. App. 574, 585 (1893), (36 N. E. Rep. 216); *Albee v. Floyd County*, 46 Ia. 177 (1877); *Chosen Freeholders v. Strader*, 18 N. J. L. 108 (1840); *Chosen Free-*

There is, however, in this country¹ no arbitrary distance at the ends of a bridge that can be said as a matter of law to constitute a part of it. How far from the main structure the so-called approaches may extend is rather a question of fact to be determined by the jury, under proper instructions, taking into consideration all the circumstances of the particular case.²

holders *v.* Hough, 55 N. J. L. 628, 643 (1893), (28 Atl. Rep. 86); Westfield *v.* Tioga County, 150 Pa. St. 152 (1892), (24 Atl. Rep. 700).

"The approaches and abutments of the bridge all constituting parts of one and the same structure, an allegation that railing was absent from the abutment was supported by evidence showing that it was absent from the approach to the bridge." *Augusta v. Hudson*, 94 Ga. 135, 138 (1894), (21 S. E. Rep. 289).

That the abutments constitute a part of the bridge appears to admit of no question. *Augusta v. Hudson*, 94 Ga. 135 (1894), (21 S. E. Rep. 289); *Tinkham v. Stockbridge*, 64 Vt. 480 (1892), (24 Atl. Rep. 761).

¹ In England, by Stat. 22 Hen. VIII. c. 5, and the subsequent bridge acts, the highway at either end of a bridge to the extent of three hundred feet was made the approach thereto. Though these acts were considered to be merely declaratory of the common law, this rule has not been accepted in this country.

² *Moreland v. Mitchell County*, 40 Ia. 394 (1875); *Miller v. Boone County*, 95 Ia. 5, 9 (1895), (63 N. W. Rep. 352); *Tinkham v. Stockbridge*, 64 Vt. 480 (1892), (24 Atl. Rep. 761).

In the latter case the trial court, in effect, instructed the jury that "whatever was necessary to connect the wooden structure that spanned the stream and the stone abutments on which it rested with the highway built on the solid ground, and to make the structure accessible and useful as a part of the highway, was a part of the bridge." This was held to be "substantially correct."

In *Joliet v. Verley*, 35 Ill. 58 (1864), it was held that while a city was under no obligation to make approaches to a bridge built by third parties, it might do so, and if it undertook to make such approaches, it was bound to so do the work as not to endanger the lives or limbs of its citizens. Having constructed such approaches without sufficient guards, it was liable for injuries due thereto.

Where a portion of a highway has been lowered for the purpose of having a railroad pass over it by means of a bridge, that portion of

§ 43. **What a Traveller may assume.**—A traveller, on approaching a bridge, if he has no knowledge of any defects in it, has the right to assume that it has been so constructed and kept in such repair as to meet the usual and ordinary demands of travel over the highway of which it forms a part,—in other words, that it is reasonably safe and sufficiently strong to support such loads as were commonly carried over the highways in the vicinity where it is located at the time when it was built. And he has a right to act upon this assumption and to enter upon the bridge without stopping to make any examination, provided he proposes to transport only a load of the ordinary and usual weight, and provided there is nothing in the appearance of the structure, or in any other circumstance, which would suggest to the mind of a man of ordinary prudence that it was unsafe or in any way insufficient for the use to which he is about to subject it.¹ He cannot, therefore, be considered guilty of negligence in relying, under such circumstances, upon its apparent condition of soundness and safety.²

If, however, the traveller proposes to transport over the bridge a load of unusual weight, or to put it to such a use as to subject it in some other manner to undue strain, he has no right to rely upon its apparent condition and to act on the assumption that it is safe and sufficiently strong for the use he is about to make of it. It becomes his duty, in such a case, to stop before entering upon it and to make the highway so lowered is not included in the approaches to the bridge. *Whitcher v. Somerville*, 138 Mass. 454 (1885); and see also *White v. Quincy*, 97 Mass. 430 (1867).

¹ As to the effect of knowledge on the part of the traveller that the bridge upon which he is about to enter is defective, see § 45, *post*.

² *Park v. Adams County*, 3 Ind. App. 536, 537 (1891), (30 N. E. Rep. 147); *Allen County v. Creviston*, 133 Ind. 39, 48 (1892), (32 N. E. Rep. 735); *La Porte County v. Ellsworth*, 9 Ind. App. 566 (1893), (37 N. E. Rep. 22).

some investigation as to its condition and as to the probable strain that it was intended to withstand. If he fails to do this, such failure is evidence of negligence on his part which may properly be submitted to the jury.¹

§ 44. Contributory Negligence.—A traveller who attempts to enter upon and to cross over a bridge, must do so with due care and prudence. If he is himself guilty of any negligence in the manner of his travelling,² or in the use to which he puts the structure,³ provided such negligence contributes to his injury, he cannot recover damages therefor from the municipal corporation whose duty it was to keep the bridge in repair. And whether or not the traveller in the particular case has been guilty of contributory negligence is generally a question for the jury to determine upon a consideration of all the evidence in the case.⁴

§ 45. The Traveller's Knowledge of the Defective Condition of the Bridge.—Travel upon the highway is usually a matter not merely of right, but also of necessity. This

¹ Clark County *v.* Brod, 3 Ind. App. 585 (1891), (29 N. E. Rep. 430); Allen County *v.* Creviston, 133 Ind. 39, 48 (1892), (32 N. E. Rep. 735); Shadler *v.* Blair County, 136 Pa. St. 488 (1890), (20 Atl. Rep. 539). In this last case the judge in the trial court in effect instructed the jury that before crossing, the plaintiff was bound to take notice of its apparent strength, the purpose for which it was built, and the kind of vehicles ordinarily used thereon. This was approved by the higher court.

² See § 46, *post*.

³ Driving upon a bridge at a rapid pace, in the absence of any ordinance upon the subject, may constitute contributory negligence, Zimmerman *v.* Conemaugh Township, 5 Atl. Rep. 45 (Pa., 1886); or it may not, Jordon *v.* Hannibal, 87 Mo. 673 (1885), according to the character and size of the bridge.

In La Porte County *v.* Ellsworth, 9 Ind. App. 566, 570 (1893), (37 N. E. Rep. 22), it was held not to be contributory negligence for a traveller to attempt to cross a bridge when he might have safely crossed the stream which it spanned at some other nearby point.

⁴ Howard County *v.* Legg, 93 Ind. 523 (1883); Zimmerman *v.* Conemaugh Township, 5 Atl. Rep. 45 (Pa., 1886).

is peculiarly true as to bridges. The traveller must, as a rule, pass over them; no other course is left open to him, if he would continue his journey. Hence the law considers that he has a right in such cases to assume some risks without fault on his part, and, taking into account the exigency by which he is led to undertake the journey, will not require him to abandon it, unless the danger is of such a character that no prudent man, knowing what he knows, would encounter it. It is the general rule, therefore, that the mere fact that a traveller knows before he enters upon a bridge that it is in a defective condition is not conclusive of his right to recover damages from the municipal corporation, whose duty it was to keep the same in proper repair. It is not negligence *per se*. It is simply to be treated as evidence, though oftentimes no doubt as evidence of considerable weight, tending to show a lack of due care on his part.¹ But this general rule will not be applied if it appears that the traveller, knowing that the bridge was in a very dangerous condition, and having it in his power to avoid the danger by crossing the stream at another nearby and safe crossing which was known to him, voluntarily chose to go over the defective structure and to take his chances of being injured.²

§ 46. Putting a Bridge to a New Use. — The law does not require municipal corporations to anticipate that the bridges constructed and maintained by them will be put to uses not known at the time when they are built, nor does it oblige them to foresee necessities of travel which are not within ordinary experience at that time. Its re-

¹ *Madison County v. Brown*, 89 Ind. 48 (1883); *Howard County v. Legg*, 93 Ind. 523 (1883); *Porter County v. Dombke*, 94 Ind. 72, 76 (1883); *Boone County v. Mutchler*, 137 Ind. 140, 148 (1893), (36 N. E. Rep. 534); *Rosedale v. Golding*, 55 Kan. 167 (1895), (40 Pac. Rep. 284).

² *Cohea v. Coffeeville*, 69 Miss. 561, 564 (1891), (13 So. Rep. 668).

quirement of them is simply that they shall provide for the usual and ordinary uses to which the highway is commonly put in the neighborhood where the bridge is located, at the time when it is constructed. The rule has become well established, consequently, that municipal corporations are not liable for injuries received while the traveller is putting a bridge to a use that is unusual or extraordinary either by reason of the speed at which the crossing is attempted, or of the weight of the load, or of the character of the vehicle, or of the manner in which the weight is concentrated, or of any other circumstance.¹

This rule may, it would seem, be based either upon the doctrine of contributory negligence or upon the maxim *volenti non fit injuria*. A majority of the cases upon this subject appear to go upon the theory that the traveller who makes an unusual or extraordinary use of a bridge is to be deemed not to have exercised that degree of care which the circumstances required of him;² but there are a

¹ *Wilson v. Granby*, 47 Conn. 59 (1879); *Vermillion County v. Chipps*, 131 Ind. 56, 61 (1891), (29 N. E. Rep. 1066); *Bonebrake v. Huntington County*, 141 Ind. 62 (1894), (40 N. E. Rep. 141); *Gregory v. Adams*, 14 Gray (Mass.) 242 (1859); *Clapp v. Ellington*, 51 Hun (N. Y.), 58 (1889), (3 N. Y. Supp. 516); *McCormick v. Washington Township*, 112 Pa. St. 185 (1886), (4 Atl. Rep. 164); *Shadler v. Blair County*, 136 Pa. St. 488 (1890), (20 Atl. Rep. 539).

In *Bonebrake v. Huntington County*, 141 Ind. 62 (1894), (40 N. E. Rep. 141), it appeared that the plaintiff had attempted to pass over the bridge with a traction engine; that such engines had been in use in the neighborhood many years prior to the date of the construction of the bridge. The court decided that "the bridge must be held to have been built in the anticipation of taking such engines over." See also *Coulter v. Pine Township*, 161 Pa. St. 543 (1894), (30 Atl. Rep. 490).

² *Clark County v. Brod*, 3 Ind. App. 585 (1891), (29 N. E. Rep. 430); *Wabash v. Carver*, 129 Ind. 552 (1891), (29 N. E. Rep. 25); *Allen County v. Creviston*, 133 Ind. 39 (1892), (32 N. E. Rep. 735); *Yordy v. Marshall County*, 86 Ia. 340 (1892), (53 N. W. Rep. 298); *Clapp v. Ellington*, 51 Hun (N. Y.), 58 (1889), (3 N. Y. Sup. 516).

few cases in which the theory seems to have been adopted that he who attempts such a use of a bridge is to be considered as having assumed all the risks incident to such use.¹ While each theory is perhaps equally conclusive against the plaintiff, the latter, it is submitted, has a closer and more satisfactory application to cases of this class, in as much as the exact duty of a traveller who approaches a bridge with a heavy load or an unusual vehicle can rarely be determined by him; indeed, he may do all those things, by way of precaution, that would be suggested to the mind of the ordinarily prudent man, and yet be making, as a matter of fact, an unusual and unauthorized use of the bridge.

It can seldom be said as a matter of law that the traveller was, at the time of the accident, subjecting the particular bridge to a new or extraordinary use. Whether or not he was so doing is as a general rule a question of fact for the jury to determine, taking into consideration the nature of the usual travel over the highway of which the bridge forms a part, the weight of the vehicle, the method of its construction, the manner of its locomotion, and like circumstances.²

¹ *Wilson v. Granby*, 47 Conn. 59 (1879); *Gregory v. Adams*, 14 Gray (Mass.), 242 (1859); *Shadler v. Blair County*, 136 Pa. St. 488 (1890), (20 Atl. Rep. 539).

In *Wilson v. Granby*, 47 Conn. 59 (1879), the following instruction asked for by the defendant was held to be "sound in law": "If the load was unusual and extraordinary, as to its bulk or weight, and not suitable or adapted to a way opened and prepared for the public use in the common intercourse of society, and in the transaction of the usual and ordinary affairs of business on said road, the plaintiff took every possible risk of loss and damage upon himself."

² *Wilson v. Granby*, 47 Conn. 59 (1879); *Clark County v. Brod*, 3 Ind. App. 585 (1891), (29 N. E. Rep. 430); *Wabash v. Carver*, 129 Ind. 552 (1891), (29 N. E. Rep. 25); *Allen County v. Creviston*, 133 Ind. 39 (1892), (32 N. E. Rep. 735); *Yordy v. Marshall County*, 86 Ia. 340 (1892), (53 N. W. Rep. 298); *Gregory v. Adams*, 14 Gray

§ 47. The Doctrine of Proximate Cause.—The defect in the bridge must be the proximate cause of the plaintiff's injury. In the language of a recent case:¹ "The injury must be the natural and probable consequence of the negligence, such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer, and likely to flow from his act." It does not necessarily follow, however, that the defect must be the sole proximate cause. It is generally held, indeed, that "where two causes combine to produce an injury, both of which are in their nature proximate, the one being a culpable defect in the bridge, and the other an occurrence for which neither party is responsible," the municipal corporation will still be liable, provided the injury would not have been sustained but for such defect. The concurrent cause which will not debar a traveller from recovering damages in accordance with this rule may be a pure accident, as the catching of the plaintiff's clothing upon a protruding nail,² or the wholly unforeseen

(Mass.), 242 (1859); *Clapp v. Ellington*, 51 Hun (N. Y.), 58 (1889), (3 N. Y. Supp. 516); *Shadler v. Blair County*, 136 Pa. St. 488 (1890), (20 Atl. Rep. 539); *Coulter v. Pine Township*, 164 Pa. St. 543 (1894), (30 Atl. Rep. 490).

In *Clapp v. Ellington*, 51 Hun (N. Y.), 58, 62 (1889), (3 N. Y. Supp. 516), the court says: "It is true . . . that improved implements of travel are invented, and machinery for threshing and other agricultural purposes are matters involved in civilization. It is further true that these traction engines in farming communities have within the last few years come into use in the threshing of grain, and that they are usually propelled from place to place through the highways; and that these facts will have to be taken into consideration by the jury in determining whether they are unusual or extraordinary."

¹ *Bitting v. Maxatawny Township*, 177 Pa. St. 213, 215 (1896), (35 Atl. Rep. 715).

² *Joliet v. Verley*, 35 Ill. 58 (1864); *Spaulding v. Sherman*, 75 Wis. 77 (1889), (43 N. W. Rep. 558). In this last case it appeared that the axle of the plaintiff's wagon broke and at the same time the

action of the plaintiff's horse, as its sudden fright¹ or sickness.²

bridge fell. It was held that the jury should have been instructed to determine whether the breaking of the axle or the falling of the bridge was the proximate cause of the injury, the evidence as to these points not being so clear and undisputed as to justify the court in deciding the matter as a question of law.

¹ *Augusta v. Hudson*, 94 Ga. 135 (1894), (21 S. E. Rep. 289); *Sullivan County v. Sisson*, 2 Ind. App. 311, 317 (1891), (28 N. E. Rep. 374); *Boone County v. Mutchler*, 137 Ind. 140 (1893), (36 N. E. Rep. 534); *Rohrbough v. Barbour County Court*, 39 W. Va. 472 (1894), (20 S. E. Rep. 565). And see *Bitting v. Maxatawny Township*, 177 Pa. St. 213 (1896), (35 Atl. Rep. 715), where it appeared that the plaintiff's horse had a propensity to take fright, which fact was known to the plaintiff; that becoming frightened, it backed off a side of the bridge which was unguarded by a railing. The court held that while the duty of the defendant was to provide a reasonably safe highway for ordinary travel by the ordinary horse, and there was no duty to provide for travel by exceptionally vicious, untrained, and unmanageable animals, it was a question for the jury whether this accident was one that ought to have been foreseen and guarded against.

Where it appeared that when the plaintiff had approached within a short distance of the bridge, his horses became frightened at a plank standing upright in it, and overturned the carriage, doing the damage of which complaint was made, it was held that the defendant was not bound to so maintain its bridges that horses would not take fright at them; the extent of its duty was to so maintain them that they may be safely used by persons travelling on the highway. "No action will lie where the injury is caused before the bridge is entered, by the horses of the traveller taking fright, for, where there is no duty, there can be no breach, if no breach, then no action." Municipal corporations are liable only to those who suffer an injury because a bridge is unsafe for travel; but they are not liable where the injury is suffered by a person not actually using the bridge for that purpose. *Fulton County v. Rickel*, 106 Ind. 501 (1886), (7 N. E. Rep. 220).

² *Houfe v. Fulton*, 29 Wis. 296 (1871). In this case, while the plaintiff was passing over a bridge without railings, his horse suddenly stopped, staggered, and fell over the side of the bridge. It was held that the plaintiff was entitled to recover. In *McClain v. Garden Grove*, 83 Ia. 235 (1891), (48 N. W. Rep. 1031), the facts were the same, save that here there was a railing against which the horse fell, carrying it with him as he went off the bridge. The court held that the action of the horse was the proximate cause of the injury.

§ 48. The Extent of the Liability relative to Bridges. — Municipal corporations are not insurers of the safety of their bridges.¹ They are bound simply to use reasonable care and diligence in the construction and maintenance of them, so that they may be reasonably safe for the ordinary² passage of travellers both by day and in the night-time.³

¹ *Porter County v. Dombke*, 94 Ind. 72, 75 (1883); *Wabash County v. Pearson*, 120 Ind. 426 (1889), (22 N. E. Rep. 134); *Vermillion County v. Chipps*, 131 Ind. 56 (1891), (29 N. E. Rep. 1066); *Holmes v. Hamburg*, 47 Ia. 348 (1877); *Blank v. Livonia Township*, 79 Mich. 1, 5 (1889), (44 N. W. Rep. 157).

² The liability of a municipal corporation “stops with constructing and maintaining its bridges so as to protect against injury by a reasonable, proper and probable use thereof in view of the surrounding circumstances, such as the extent, kind and nature of the travel, and business on the road of which it forms a part.” *McCormick v. Washington Township*, 112 Pa. St. 185, 197 (1886), (4 Atl. Rep. 164).

³ *Knox County v. Montgomery*, 109 Ind. 69 (1886), (9 N. E. Rep. 590); *Bitting v. Maxatawny Township*, 177 Pa. St. 213 (1896), (35 Atl. Rep. 715); *Stephani v. Manitowoc*, 89 Wis. 467 (1895), (62 N. W. Rep. 176).

The employment of a competent bridge tender will not relieve the defendant corporation from responsibility for the unsafe condition of the structure. *Stephani v. Manitowoc*, 89 Wis. 467 (1895), (62 N. W. Rep. 176).

If it appears that without the use of certain appliances a bridge is defective in construction, and not ordinarily well built, it is negligence on the part of the defendant corporation not to use such appliances. *Cooper v. Mills County*, 69 Ia. 350, 355 (1886), (28 N. W. Rep. 633).

In the course of the opinion in *Medina Township v. Perkins*, 48 Mich. 67, 72 (1882), (11 N. W. Rep. 810), Chief Justice Graves says: In requiring ordinary care and diligence, “the law must be taken as contemplating what would have to be encountered, in the size of the township, the sparseness of population, the number and remoteness of the ways and bridges which would be equal objects of attention, the unfitness of the organization and its official staff for prompt inspections and prompt reparations and the unlikelihood of finding road officers with exceptional qualifications. And the supposition is not admissible that an intention has existed to require something not consistent with such conditions. The law will not impose an impracticable rule of duty. Township officers are not expected to be experts,

In order, therefore, to recover damages for injuries due to the defective condition of a bridge, it is not enough for the plaintiff to show merely that there was a defect therein and that this defect caused his injury. He must go one step further and show that the existence of this defect was due to the negligence of the municipal authorities in constructing or in maintaining the bridge. The whole liability of municipal corporations in this regard rests thus upon negligence.¹

It follows that they are not liable for injuries due to latent defects in the structure, such defects as could not have been discovered by the exercise of reasonable care and diligence. And yet, even though the defect be latent in character, if its existence is actually known to the municipal authorities, the corporation will be liable for any injuries caused by its failure to exercise reasonable care in remedying it.²

nor learned engineers, nor persons liberally instructed in mechanics, nor individuals equipped with the resources of experienced specialists; and nothing more can be demanded of them than reasonable intelligence and ordinary care and prudence. And no duty is enjoined on the township to keep informed of the condition of its bridges that may be taken as being above the capacity of its own officers."

Municipal corporations are not required to keep their bridges in such condition that horses will not take fright at them. *Fulton County v. Rickel*, 106 Ind. 501 (1886), (7 N. E. Rep. 220).

¹ *Howard County v. Legg*, 93 Ind. 523, 527 (1883); *Patton v. Montgomery County*, 96 Ind. 131 (1884); *Holmes v. Hamburg*, 47 Ia. 348 (1877); *Cooper v. Mills County*, 69 Ia. 350 (1886), (28 N. W. Rep. 633); *Medina Township v. Perkins*, 48 Mich. 67 (1882), (11 N. W. Rep. 810); *Lehigh County v. Hoffort*, 116 Pa. St. 119 (1887), (9 Atl. Rep. 177).

In *Ripley v. Chosen Freeholders*, 40 N. J. L. 45 (1878), the defendant was held liable for injuries done to the plaintiff's vessel while attempting to pass through the draw of a bridge, said injuries being due to the defendant's failure to keep the bridge in repair.

² *Vermillion County v. Chipps*, 131 Ind. 56, 62 (1891), (29 N. E.

§ 49. The Liability for Defects due to the Plans adopted.—It is the general rule that municipal corporations act judicially in selecting the plan in accordance with which a bridge is to be constructed, and are not, therefore, subject to a private action for mere errors of judgment in respect to the plan finally adopted.¹

It has been held in some cases, however, that they must exercise reasonable care and skill in the selection of the plan. This does not necessarily require them to adopt the best known plan for bridge building, but simply such a plan as shall insure a reasonably safe and sufficient structure — one suited to the place at which it is to be built. If they fail to exercise this much care and skill in the adoption of the plans for the bridge, they cannot escape liability for damages due to the structure that is built, simply because such defects are directly traceable to the insufficiency of the plans selected.

§ 50. The Liability in Respect to the Width of the Bridge.—It is the duty of municipal corporations to so construct their bridges that they shall be sufficiently broad to permit the passage over them of all vehicles and

Rep. 1066); *Childs v. Crawford County*, 176 Pa. St. 139, 148 (1896), (34 Atl. Rep. 1020).

¹ See *Jordan v. Hannibal*, 87 Mo. 673, 675 (1885); *Delaware County's Appeal*, 119 Pa. St. 159 (1888), (13 Atl. Rep. 62).

² *Ferguson v. Davis County*, 57 Ia. 601, 608 (1881), (10 N. W. Rep. 906); *Childs v. Crawford County*, 176 Pa. St. 139 (1896), (34 Atl. Rep. 1020).

It has been held that a plaintiff is entitled to recover damages where a municipal corporation constructs a bridge according to plans, the effect of which is to so narrow the channel as to cause the water to set back, and so to interfere with his right to drainage for his land, *Lawrence v. Fairhaven*, 5 Gray (Mass.), 110 (1855); *Perry v. Worcester*, 6 Gray (Mass.), 544 (1856); or with his right to previously acquired mill privileges, *Riddle v. Delaware County*, 156 Pa. St. 643 (1893), (27 Atl. Rep. 569). These decisions are, however, based purely upon the principles of the law relating to watercourses.

machinery in common use upon the highway in the neighborhood where they are located, at the time when they are constructed. In short, they must be sufficiently broad to meet the usual and ordinary requirements of the travelling public, having regard to the time when, and the place where, they are constructed.¹ But in order to recover damages because of the insufficient width of a bridge, it must of course appear that such insufficiency was the proximate cause of the injury.²

§ 51. The Liability in Respect to the Height of the Bridge above a Highway.—Municipal corporations are bound to so construct and maintain a highway at the point where it passes under a bridge that there shall be sufficient space in point of height to allow travellers to pass under the bridge safely with vehicles and loads of a size in common use, and will, therefore, be liable for any damages occasioned by their failure to so do.³

§ 52. The Liability in Respect to the Strength of the Bridge.—The law requires that municipal corporations shall construct and maintain bridges of sufficient strength to insure the safety of travellers who pass over them with vehicles of such a character, and with loads of such a weight, as are commonly and ordinarily used in the

¹ *Quinton v. Burton*, 61 Ia. 471, 476 (1883), (16 N. W. Rep. 569).

² *Barron v. Chicago, etc. R. Co.*, 89 Wis. 79, 82 (1894), (61 N. W. Rep. 303); *Missouri River Packet Co. v. Hannibal, etc. R. Co.*, 1 McCrary (U. S.), 281 (1880).

³ *Gray v. Danbury*, 54 Conn. 574 (1887), (10 Atl. Rep. 198), where the plaintiff attempted to pass under a bridge with a load of hay of ordinary size; *Talbot v. Taunton*, 140 Mass. 552 (1886), (5 N. E. Rep. 616), where the plaintiff attempted such passage with an omnibus.

In this last case, the court says, at page 556: "In such case, the bridge is not the defect, but the way itself becomes defective and out of repair, because, its grade being raised, its surface is brought so near the bridge as to render travel in the street unsafe, inconvenient, and dangerous."

vicinity where they are located, at the time when they are built. This simply requires that they should be made sufficiently strong "to protect against injury by a reasonable, proper, and probable use thereof in view of the circumstances, such as the extent, kind and nature of the travel and business on the road of which it forms a part." They are not obliged, of course, to anticipate that a bridge will be put to any uses which will involve a greater strain, and therefore require greater strength, than the uses known to the municipal authorities at the time of its construction. It has become the established rule, consequently, that municipal corporations are not liable to any traveller who is injured while subjecting a bridge to an unusual or extraordinary strain.¹

§ 53. The Liability in Respect to Railings. — The duty of municipal corporations relative to the erection of railings is not an absolute one. They are not bound to build them upon all bridges at all events. The safety of the travelling public is, of course, the test of the necessity of such safeguards. They must, thus, erect railings upon their bridges and the approaches thereto whenever such guards may be needed to render the structures reasonably safe for travel in the ordinary modes and with the ordinary horse. And if railings are required, they must be of sufficient height and strength to meet all those incidental uses to which they may reasonably be put by travellers who are crossing; they need not be such as to withstand any unusual or extraordinary strains.² If the failure to

¹ *Vermillion County v. Chippes*, 131 Ind. 56, 61 (1891), (29 N. E. Rep. 1066); *Yordy v. Marshall County*, 86 Ia. 340 (1892), (53 N. W. Rep. 298); *Clapp v. Ellington*, 51 Hun (N. Y.), 58 (1889), (3 N. Y. Supp. 516).

² *Shelby County v. Blair*, 8 Ind. App. 574, 585 (1893), (36 N. E. Rep. 216); *McClain v. Garden Grove*, 83 Ia. 235, 237 (1891), (48 N. W. Rep. 1081); *Langlois v. Cohoes*, 58 Hun (N. Y.), 226, 229 (1890), (11 N. Y. Supp. 908).

erect proper and sufficient railings where the circumstances required them is established, and it appears that such failure was the proximate cause of the accident, the defendant corporation will be liable for all damages occasioned by the omission of them.¹

As already indicated, the failure to erect railings is not, as a general rule, negligence *per se*. The question whether or not the bridge was defective without them is commonly one of fact for the jury to determine in view of the surroundings where the bridge is located, its width and length, and elevation above the water, and the nature and amount of travel over it.

§ 54. The Liabilities in Respect to Barriers. — As has been pointed out, the general obligation resting upon municipal corporations relative to bridges is to keep them in a reasonably safe condition for travel both by day and in the night-time. The existence of a structural defect that is known or reasonably ought to be known, or the

¹ *Augusta v. Hudson*, 94 Ga. 135 (1894), (21 S. E. Rep. 289); *Sullivan County v. Sisson*, 2 Ind. App. 311 (1891), (28 N. E. Rep. 374); *Boone County v. Mutchler*, 137 Ind. 140 (1893), (36 N. E. Rep. 534); *Rosedale v. Golding*, 55 Kan. 167 (1895), (40 Pac. Rep. 284); *Carleton v. Caribou*, 88 Me. 461 (1896), (34 Atl. Rep. 269); *Bullock v. Durham*, 64 Hun (N. Y.), 380 (1892), (19 N. Y. Supp. 635); *Rohrbough v. Barbour County Court*, 39 W. Va. 472 (1894), (20 S. E. Rep. 565); *Houfe v. Fulton*, 29 Wis. 296 (1871).

In *Lehigh County v. Hoffort*, 116 Pa. St. 119 (1887), (9 Atl. Rep. 177), it appeared that while the plaintiff was crossing a bridge on the footway, she was run down and injured by a runaway team; that there was between the footway and the carriage-way a six-inch stone curbing, but no railing or guards to protect the travellers on foot from such teams. It was held that the county was not liable, on the ground that it was unreasonable to suppose that such an accident should have been foreseen as the result of the failure to erect railings above the curb.

² *Ross v. Ionia Township*, 104 Mich. 320 (1896), (62 N. W. Rep. 401); *Staples v. Canton*, 69 Mo. 592, 593 (1879); *Bitting v. Maxatawny Township*, 177 Pa. St. 213 (1896), (35 Atl. Rep. 715).

work of making repairs, particularly in the flooring, necessarily renders a bridge more or less unsafe for travel, especially at night. And in the nature of things, the dangers arising therefrom are such as can be guarded against only by some special precaution. If, therefore, a municipal corporation knows, or reasonably ought to have known, that a bridge is structurally defective, or if it undertakes to make repairs therein, it is bound to provide at the dangerous spot suitable and proper safeguards against accident, — either barriers, or lights, or both, as the circumstances may require; and it will, of course, be responsible for any damages due to its failure to take such special precautions as the situation demanded.¹ And, moreover, the employment of a contractor to make the repairs upon the structure will not in any degree relieve it from this duty, nor serve as a defence to an action based upon a failure to perform it.²

If, however, a municipal corporation builds a barricade about the dangerous place sufficient in height and strength to protect travellers who may make a proper use of the bridge, it has done all that can reasonably be required of it, and will not be responsible for any accident that may happen because of the existence of such dangerous place. And this is so, even though the barriers have been subsequently broken down or entirely removed by some unforeseen accident or by the act of some third

¹ *Park v. Adams County*, 3 Ind. App. 536 (1891), (30 N. E. Rep. 147); *Van Winter v. Henry County*, 61 Ia. 684 (1883), (17 N. W. Rep. 94); *Chosen Freeholders v. Hough*, 55 N. J. L. 628 (1893), (28 Atl. Rep. 86); *Hawxhurst v. Mayor, etc. of New York*, 43 Hun (N. Y.), 588 (1887); *Stephani v. Manitowoc*, 89 Wis. 467 (1895), (62 N. W. Rep. 176).

² *Park v. Adams County*, 3 Ind. App. 536 (1891), (30 N. E. Rep. 147); *Hawxhurst v. Mayor, etc. of New York*, 43 Hun (N. Y.), 588, (1887).

party, unless it further appears that the corporation knew, or by the exercise of reasonable diligence might have known, of such breaking down or removal in time to have prevented the injury.¹

§ 55. The Duty of Municipal Corporations relative to the Inspection of Bridges. — It is a matter of common knowledge that the timbers and other materials from which bridges are constructed have a tendency to deteriorate with long use and to decay with the lapse of time and exposure to the weather, and that in consequence a bridge, if left to itself, will in time become a source of positive danger to the travelling public. Such being the fact, municipal corporations are under obligation to exercise a reasonable degree of affirmative and active diligence and caution to ascertain the condition of those bridges for which they are responsible.² And it has been held, fur-

¹ *Weirs v. Jones County*, 80 Ia. 351 (1890), (45 N. W. Rep. 883); *Mullen v. Rutland*, 55 Vt. 77 (1883).

² *Madison County v. Brown*, 89 Ind. 48, 52 (1883); *Howard County v. Legg*, 93 Ind. 523, 528 (1883); *Allen County v. Creviston*, 133 Ind. 39, 47 (1892), (32 N. E. Rep. 735); *Blank v. Livonia Township*, 79 Mich. 1, 6 (1889), (44 N. W. Rep. 157); *Childs v. Crawford County*, 176 Pa. St. 139, 150 (1896), (34 Atl. Rep. 1020).

Where it appeared that during eight years of use and exposure to the elements, no inspection of the bridge had been made nor had any care whatever been exercised to ascertain its condition, the court held that there was no escape from the conclusion that the municipal authorities were guilty of actionable negligence. *Allen County v. Creviston*, 133 Ind. 39, 47 (1892), (32 N. E. Rep. 735).

In *Blank v. Livonia Township*, 79 Mich. 1 (1889), (44 N. W. Rep. 157), the court says, at page 4: "The care and caution required in ascertaining whether timbers in a bridge are sound must necessarily depend in a measure upon the length of time the bridge has been built; especially is this so in respect to the soundness or unsoundness of the timber from internal decay or 'dry rot.'" And again, at page 6: "In respect to latent defects in the timbers of a bridge, it is the duty of the highway commissioner to make proper and seasonable inspection to ascertain its condition as to safety for the public travel, and to

thermore, that if there are any facts known to the municipal authorities which would naturally lead them to think that the structure was in a defective condition, as the finding of decayed timbers while making slight repairs, it then becomes the duty of the corporation to make a thorough inspection of the bridge, or to have such inspection made by a competent bridge builder.¹

§ 56. The Duty to make Repairs. — After bridges have been built, the duty to maintain them extends only so far as to require municipal corporations to make such repairs as will keep them in a safe condition for any reasonable and probable use, taking into consideration the nature and extent of the travel over the highway of which they form a part. As has been said by the Supreme Court of Indiana: "In repairing, they have performed their whole legal duty exercise due care and caution in so doing to find defects, and the kind of inspection and the amount of care and caution required of him upon which to predicate negligence in the performance of the required duty will depend upon all the facts and circumstances of the particular case." And in *Medina Township v. Perkins*, 48 Mich. 67 (1882), (11 N. W. Rep. 810), Chief Justice Graves says, at page 72: "No duty is enjoined on the township to keep informed of the condition of its bridges, that may be taken as being above the capacity of its own officers."

In a case where the bridge had stood for a long time and the timbers, although they appeared to be sound outwardly, were decayed within, the court said: "When a bridge is old, having stood for the length of time the timbers composing it are accustomed to last, and when it may be reasonably expected that decay has set in, it is negligence to omit all proper precautions to ascertain its true condition. Nor will mere appearance in such a case excuse the neglect. It is a matter of common knowledge that invisible defects may, and under such circumstances probably do exist; that either wet or dry rot may have set in, and not be visible, and therefore should be sought for. But no one of ordinary intelligence would think of seeking for an inward and invisible defect by merely inspecting the surface of the wood." *Rapho Township v. Moore*, 68 Pa. St. 404, 408 (1871).

¹ *Spaulding v. Sherman*, 75 Wis. 77, 79 (1889), (43 N. W. Rep. 558).

when they have put them in as good a condition of strength and soundness as will make them as secure as new bridges of the same kind and plan.”¹ To accomplish this end, municipal corporations are bound simply to exercise reasonable care and skill to select the proper means and competent persons for the work in hand; and if, having done this much, the bridge proves to be still unsafe, they will not be responsible.²

But at common law this duty to repair is itself conditional. It does not arise at all, unless the corporation has at its disposal the funds or the means to secure them, which may be employed in its performance.³ “Yet, having exclusive control, it is required by law to maintain its bridges kept open for the use of the public, in reasonably safe condition and repair; and if, for any reason, as, that the cost of repair will be more than the fund at the disposal of the municipality, or which it might, by the exercise of its corporate powers, command, the repair is impossible, the street or bridge, if known to be unsafe, should not be held out to the public as safe for its use. The duty of the corporate authorities would be to close the bridge against the public, and warn them of the danger of passage over it until put in proper repair.”⁴

¹ Mr. Justice Coffey in *Vermillion County v. Chipps*, 131 Ind. 56, 61 (1891), (29 N. E. Rep. 1066).

² *Wabash County v. Pearson*, 120 Ind. 426 (1889), (22 N. E. Rep. 134); *Vermillion County v. Chipps*, 131 Ind. 56, 61 (1891), (29 N. E. Rep. 1066); *Stebbins v. Keene Township*, 60 Mich. 214 (1886), (26 N. W. Rep. 885); *McCormick v. Washington Township*, 112 Pa. St. 185 (1886), (4 Atl. Rep. 164); *Childs v. Crawford County*, 176 Pa. St. 139, 150 (1896), (34 Atl. Rep. 1020).

³ See § 9, *ante*.

⁴ Mr Justice Shope, in *Carney v. Marseilles*, 136 Ill. 401, 406 (1891), (26 N. E. Rep. 491). In that case it was held that since the defendant corporation had permitted the bridge to remain open for public use for five years without warning or notice of its dangerous condition,

§ 57. The Necessity of showing Notice. — In order to fix the liability of a municipal corporation for injuries occasioned by the defective condition of a bridge which it is bound to maintain, it is not enough for the plaintiff to show that a defect existed in the structure and that such defect was the proximate cause of his injury. The burden rests upon him to show also that the defendant had notice of the existence of that very defect, or might, by the exercise of reasonable care and diligence, have had notice of it in time to have prevented the accident. This requirement is, of course, simply a phase of the fundamental rule that municipal corporations are not insurers of the safety of their bridges. Their whole liability at common law is founded upon negligence; but obviously no negligence can be predicated as to defective conditions the existence of which they do not know, and could not with due diligence discover.

§ 58. When Notice need not be shown. — The rule requiring a plaintiff, in order to maintain his action, to bring home to the defendant corporation notice of the defective condition that caused his injury, does not apply where such defective condition was a plain lack of completion of the bridge for the use for which it was intended. In such cases, since the action is based upon some fault

it could not be heard, in a suit for damages resulting from its failure to discharge the duty of keeping the structure in a safe condition, to say that it had no funds with which to make the repairs.

¹ *Howard County v. Legg*, 93 Ind. 523, 527 (1883); *Allen County v. Bacon*, 96 Ind. 31 (1884); *Ferguson v. Davis County*, 57 Ia. 601, 609, 612 (1881), (10 N. W. Rep. 906); *O'Neil v. Deerfield Township*, 86 Mich. 610 (1891), (49 N. W. Rep. 596); *Cohea v. Coffeeville*, 69 Miss. 561 (1891), (13 So. Rep. 668); *Jordan v. Hannibal*, 87 Mo. 673, 675 (1885); *Foels v. Tonawanda*, 75 Hun (N. Y.), 363 (1894), (27 N. Y. Supp. 113); *Childs v. Crawford County*, 176 Pa. St. 139 (1896), (34 Atl. Rep. 1020); *McDonald v. Ashland*, 78 Wis. 251 (1890), (47 N. W. Rep. 434).

in the original construction, such as the use of unsafe or unsuitable materials, or the omission to supply such safeguards as the circumstances plainly required, the injury must be a direct result either of some positive acts or of the omission of some plainly necessary precautions on the part of the defendant corporation itself. Acts or omissions of such a character must, of course, be considered to be directly within the knowledge of the corporation, and for this reason the law relieves the plaintiff from the necessity of proving notice.¹

This rule is, however, an apparent rather than a real exception to that doctrine which makes notice of the existence of the defective condition an element in the plaintiff's case. For in cases of this class, where the action is based upon some defect in the original construction of the bridge, the law does not dispense with notice altogether, but simply relieves the plaintiff from the burden of establishing it by conclusively presuming that the defendant had the necessary knowledge. In short, the law justly considers that municipal corporations are chargeable with notice of their own work, and will not compel a plaintiff to prove the fact.

§ 59. **Notice to whom.**—Whatever differences of opinion may exist upon this subject, it is obviously safe to lay down the rule that knowledge on the part of, or notice to, that board of officials which is charged by law with the care and supervision of the bridges of a municipal corporation, is the knowledge of, or notice to, the corporation itself. And notice to one member of such a board is notice to the board.²

¹ *Wabash County v. Pearson*, 120 Ind. 426, 428 (1889), (22 N. E. Rep. 134); *Boone County v. Mutchler*, 137 Ind. 140, 147 (1893), (36 N. E. Rep. 534); *Stephani v. Manitowoc*, 89 Wis. 467 (1895), (62 N. W. Rep. 176).

² *Allen County v. Bacon*, 96 Ind. 31 (1884); *Jaquish v. Ithaca*; 36 Wis. 108, 111 (1874).

§ 60. **Actual Notice — When necessary.** — Actual notice is simply knowledge on the part of those officers whose duty it is to see that the bridges of a municipal corporation are kept in proper repair, of those conditions that constitute the alleged defect. It is real knowledge as opposed to a presumption of knowledge based upon the omission to make proper investigation. If, then, a defect is latent in character, — one that cannot be discovered by a reasonable investigation, — the proper officers must be shown to have had actual notice of its existence, if the plaintiff would maintain his action.¹

§ 61. **Constructive Notice.** — It is not essential that the plaintiff should show that the defendant corporation had actual knowledge of the defective condition of the bridge where the accident happened. He may still, as a rule, sustain the burden of proof that rests upon him in regard to noticee, if he can establish the fact that it might have had knowledge of such condition by the exercise of reasonable care and diligence. Has the defect existed long enough, and is it of such a character, that the proper municipal officers might, if reasonably diligent, have had knowledge of it? That is the question for the jury to determine in view of all the circumstances of the particular case.²

¹ *Blank v. Livonia Township*, 79 Mich. 1, 6 (1889), (44 N. W. Rep. 157); *Childs v. Crawford County*, 176 Pa. St. 139, 149 (1896), (34 Atl. Rep. 1020).

² *Madison County v. Brown*, 89 Ind. 48, 52 (1883); *Howard County v. Legg*, 93 Ind. 523, 527 (1883); *Porter County v. Dombke*, 94 Ind. 72, 75 (1883); *La Porte County v. Ellsworth*, 9 Ind. App. 566, 569 (1893), (37 N. E. Rep. 22); *Homan v. Franklin County*, 98 Ia. 692 (1896), (68 N. W. Rep. 559); *Medina Township v. Perkins*, 48 Mich. 67 (1882), (11 N. W. Rep. 810); *McKeller v. Monitor Township*, 78 Mich. 485 (1889), (44 N. W. Rep. 412); *Blank v. Livonia Township*, 79 Mich. 1 (1889), (44 N. W. Rep. 157); *O'Neil v. Deerfield Township*, 86 Mich. 610 (1891), (49 N. W. Rep. 596); *Jordan v.*

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§ 62. **The Duty after Notice.**—After receiving notice, actual or constructive, of the defective condition of a Hannibal, 87 Mo. 673, 675 (1885); *Walker v. Point Pleasant*, 49 Mo. App. 244, 248 (1892); *Chosen Freeholders v. Hough*, 55 N. J. L. 628, 641 (1893), (28 Atl. Rep. 86); *Bullock v. Durham*, 64 Hun (N. Y.), 380 (1892), (19 N. Y. Supp. 635); *Foels v. Tonawanda*, 75 Hun (N. Y.), 363 (1894), (27 N. Y. Supp. 113); *McDonald v. Ashland*, 78 Wis. 251 (1890), (47 N. W. Rep. 434).

In *Chosen Freeholders v. Hough*, 55 N. J. L. 628 (1893), (28 Atl. Rep. 86), the existence of an open and notorious defect for five days was held to be a sufficient length of time from the lapse of which notice might properly be inferred of a defect of that character.

In *Blank v. Livonia Township*, 79 Mich. 1 (1889), (44 N. W. Rep. 157), the court says, at page 6: "When the defects are open to view, or apparent to persons travelling over the bridge or along a highway, and have existed such a length of time that the proper officers whose duty it is to see that the highway is kept in repair would be considered negligent in not seeing such defects, then the jury may presume notice or knowledge of such defects." And in *Porter County v. Dombke*, 94 Ind. 72, 75 (1883), it is said: "What is such a length of time as will charge public officers with notice of a defect in a bridge or highway must, in a great measure, depend upon the circumstances of the particular case, and must, in most cases, be a question of fact to be submitted, under proper instructions, to the jury. It is obvious that a greater length of time should be required in cases of country bridges than in cases where the bridge belongs to a town or city, because it cannot be expected that the same oversight can be maintained by county officers whose jurisdiction extends over a large extent of territory, as by city or town officers whose jurisdiction is over a limited territory compactly settled, and who are much better provided with means for ascertaining defects in bridges than county officers."

Where the bridge had been examined by the proper officers two months before the accident, and there was nothing in the general appearance of the timber or of the bridge to indicate any weakness, it was held that the defendant had neither a constructive notice nor constructive knowledge that the stringer which gave way was defective. And the court says: "While the age of a bridge may suggest probable infirmity, and impose the duty of inspection upon a township, and its condition may be such as to charge the township with knowledge, yet the township cannot be charged with knowledge or notice in the absence of anything that is suggestive of weakness, and in spite of the lack of knowledge of or notice to either its agents or the general

bridge, a municipal corporation is bound to take such steps as may reasonably be necessary to have the structure repaired or to have public travel thereon stopped. And it is entitled to such further time as may be reasonably required in which to take the proper precautions to prevent injuries to travellers, before liability will attach. Whether or not, therefore, there be any liability in a given case of this class, turns upon the question whether the defendant corporation used due diligence after notice or knowledge of the defect to guard against accident.¹

public, while at the same time positive acts on the part of the township are shown indicating proper care and careful inspection.” *O’Neil v. Deerfield Township*, 86 Mich. 610, 614 (1891), (49 N. W. Rep. 596).

¹ *Allen County v. Bacon*, 96 Ind. 31 (1884); *Ferguson v. Davis County*, 57 Ia. 601, 610 (1881), (10 N. W. Rep. 906); *Blank v. Livonia Township*, 79 Mich. 1, 5 (1889), (44 N. W. Rep. 157); *Jaquish v. Ithaca*, 36 Wis. 108, 111 (1874).

CHAPTER VI.

THE LIABILITY RELATIVE TO STREETS AND HIGHWAYS.

PART I.

The Liability growing out of their Construction.

§ 63. **The Nature of the Duty to construct Public Ways** — **The Failure to perform it.** — The general power to construct streets and highways which is usually conferred upon municipal corporations either by charter¹ or by statutory provision, carries with it no absolute obligation. Its exercise is rather conditioned upon the determination of numerous questions which are necessarily left to the judgment and discretion of those municipal authorities to whom it is intrusted. It is for them to decide whether or not a proposed way is necessary; and if deemed necessary, to determine its location, its dimensions, its grade, and like particulars. The duty growing out of the possession of this power is, therefore, treated as legislative or judicial in character, and the courts extend to the acts done in its performance, if they be not negligent, that some rule of immunity which affords freedom of action and protection to the legislator and the judge.

Consequently it has been held that municipal corporations cannot be made at common law to respond in damages for any failure or omission to exercise their power to con-

¹ "The charter of a municipal corporation is a public act, of which the courts take judicial notice, without any recital of its provisions in the pleadings." *Albrittin v. Huntsville*, 60 Ala. 486, 492 (1877).

struct public ways.¹ And, furthermore, it is generally conceded to be the rule that when the proper municipal officials have passed upon the necessity of any proposed street or highway, their decision is final, and cannot properly at any subsequent time be submitted to a jury for revision.²

§ 64. The Consequential Damages arising from the Construction of Streets and Highways.—When municipal corporations, acting under an authority contained in their charters or conferred upon them by the legislature by some general or special act, proceed to lay out, grade, and pave streets and highways, if they exercise proper care and skill in the work and do not exceed the authority given them, they are not answerable at common law for any consequential damages that may be sustained by those property owners whose land is bounded by such streets and highways.³ All such damages are simply such as are nec-

¹ *Aurora v. Pulfer*, 56 Ill. 270, 273 (1870); *Williams v. Grand Rapids*, 59 Mich. 51 (1886), (26 N. W. Rep. 279); *Hines v. Lockport*, 50 N. Y. 236 (1872); *Urquhart v. Ogdensburg*, 91 N. Y. 67, 71 (1883); *Seymour v. Salamanca*, 137 N. Y. 364 (1893), (33 N. E. Rep. 304); *Easton v. Neff*, 102 Pa. St. 474, 477 (1883).

² *Easton v. Neff*, 102 Pa. St. 474 (1883).

³ *Arkansas*. *Simmons v. Camden*, 26 Ark. 276 (1870).

California. *Shaw v. Crocker*, 42 Cal. 435 (1871).

Connecticut. *Clark v. Saybrook*, 21 Conn. 313 (1851); *Burritt v. New Haven*, 42 Conn. 174 (1875); *Fellowes v. New Haven*, 44 Conn. 240 (1876).

Delaware. *Clark v. Wilmington*, 5 Harr. 243 (1849); *Magarity v. Wilmington*, 5 Houst. 530 (1879).

Florida. *Dorman v. Jacksonville*, 18 Fla. 588 (1870).

Georgia. *Rome v. Omberg*, 28 Ga. 46 (1859); *Fuller v. Atlanta*, 66 Ga. 80 (1880).

Illinois. *Murphy v. Chicago*, 29 Ill. 279 (1862); *Quincy v. Jones*, 76 Ill. 231 (1875).

Indiana. *Snyder v. Rockport*, 6 Ind. 237 (1855); *Lafayette v. Spencer*, 14 Ind. 399 (1860); *Macy v. Indianapolis*, 17 Ind. 267 (1861); *Terre Haute v. Turner*, 36 Ind. 522 (1871).

Iowa. *Russell v. Burlington*, 30 Ia. 262, 267 (1870); *Freburg v.*

essarily incident to the exercise of a legislative or judicial power which is proper in itself, and, in conformity to the general principle in such cases, are treated as *damnum absque injuria*. This common law doctrine has been almost universally recognized and applied both in England

Davenport, 63 Ia. 119 (1884), (18 N. W. Rep. 705); Morris *v.* Council Bluffs, 67 Ia. 343 (1885), (25 N. W. Rep. 274).

Kentucky. Keasy *v.* Louisville, 4 Dana, 154 (1836).

Louisiana. Reynolds *v.* Shreveport, 13 La. An. 426 (1858); Bennett *v.* New Orleans, 14 La. An. 120 (1859).

Maine. Hovey *v.* Mayo, 43 Me. 322 (1857).

Maryland. Horn *v.* Baltimore, 30 Md. 218 (1868).

Massachusetts. Callender *v.* Marsh, 1 Pick. 418 (1823); Flagg *v.* Worcester, 13 Gray, 601 (1859).

Michigan. Pontiac *v.* Carter, 32 Mich. 164 (1875); Ashley *v.* Port Huron, 35 Mich. 296 (1877).

Minnesota. Alden *v.* Minneapolis, 24 Minn. 254 (1877).

Mississippi. White *v.* Yazoo City, 27 Miss. 357 (1854).

Missouri. St. Louis *v.* Gurno, 12 Mo. 414 (1849); Taylor *v.* St. Louis, 14 Mo. 20 (1851); Imler *v.* Springfield, 55 Mo. 119 (1874); Stewart *v.* Clinton, 79 Mo. 603 (1883).

Nebraska. Nebraska City *v.* Lampkin, 6 Neb. 27 (1877).

New Jersey. Quinn *v.* Paterson, 27 N. J. L. 35 (1858).

New York. Wilson *v.* Mayor, etc. of New York, 1 Den. 595 (1845); Radcliff *v.* Brooklyn, 4 N. Y. 195 (1850); Kavanagh *v.* Brooklyn, 38 Barb. 232 (1862).

Pennsylvania. Green *v.* Reading, 9 Watts, 382 (1840); The Mayor *v.* Randolph, 4 W. & S. 514 (1842); O'Connor *v.* Pittsburgh, 18 Pa. St. 187 (1851); Carr *v.* Northern Liberties, 35 Pa. St. 324 (1860); Reading *v.* Keppleman, 61 Pa. St. 233 (1869); Allentown *v.* Kramer, 73 Pa. St. 406 (1873).

Rhode Island. Rounds *v.* Mumford, 2 R. I. 154 (1852); Wakefield *v.* Newell, 12 R. I. 75 (1878).

Tennessee. Humes *v.* Knoxville, 1 Humph. 403 (1839).

Wisconsin. Dore *v.* Milwaukee, 42 Wis. 108 (1873).

District of Columbia. Herring *v.* District of Columbia, 3 Mackey, 572 (1885).

United States. Goszler *v.* Georgetown, 6 Wheat. 593 (1821); Smith *v.* Washington, 20 How. 135 (1857); Transportation Co. *v.* Chicago, 99 U. S. 635 (1878).

England. British Cast Plate Mfr. Co. *v.* Meredith, 4 T. Rep. 794 (1792); Dixon *v.* Board of Works, L. R. 7 Q. B. D. 418 (1881).

and in this country; the decisions in Ohio constitute, as it appears, the solitary exception.

The power to grade and improve streets and highways is in its nature a continuing power. It is not exhausted when once used; but it may be exercised as often as the municipal authorities to whom it is intrusted, in the exercise of their sound judgment and discretion, determine that the public welfare demands it. The common law rule, therefore, remains the same, even though the grade of the street in question has been once established and the abutting property owners have made their premises conform to it. "The particular hardship," says Mr. Justice Cooley, "may be made more manifest, but the principle is not affected by the circumstance that the grade of the street had once before been fixed, and that the plaintiff had built with reference to it. This might be a reason for the exercise of great caution and prudence in determining upon a change, but it could neither deprive the city of the power to establish a new grade, nor could it bring into the case any new elements which could constitute the basis of a right of action. . . . There is precisely the same reason and the same justification for changing a grade once established, when the public convenience is found to require it, that there was in fixing a grade in the first place where it was then believed it would subserve the public convenience."¹

¹ *Pontiac v. Carter*, 32 Mich. 164, 171 (1875). For additional cases on this point see above citations.

In *Pontiac v. Carter*, 32 Mich. 164 (1875), at page 172, Mr. Justice Cooley gives this explanation of the rule: "The injury in all these cases is incidental to an exercise of public authority, which in itself must be assumed to be proper, because it is had by a public body acting within its jurisdiction, and not charged with malice or want of good faith. It must, therefore, be regarded as an injury that every citizen must contemplate as one that with more or less likelihood might happen. When the land was taken for the street, if damages

In several states, however, this common law rule has been changed by legislative enactment, and it is now provided either by statutory or constitutional provision that compensation shall be given in such cases to the injured property owners.¹

§ 65. The Ohio Doctrine. — The decisions in Ohio upon this subject recognize distinctly the right of a municipal corporation, acting under a proper authority, to grade and improve its streets and highways. There is no departure from the cases in other jurisdictions so far as this point is concerned. But the decisions in Ohio also recognize, as a distinct and important element, that the exercise of were assessed, they would cover this possible injury, and it could never be known subsequently, that the jury in estimating them did not calculate upon a change in the grade of the proposed street as probable, and attach considerable importance to it in their estimate. It is matter of common observation that much beyond the value of land taken is sometimes given in these cases; not because of any present injury, but because contingencies cannot be fully foreseen. And the rule in such cases is, that all possible damages are covered by the award, except such as may result from an improper or negligent construction of the public work, or from an excess of authority in constructing it. In other words, the award covers all damages resulting from the doing in a proper manner whatever the public authorities have the right to do; but it does not cover injuries from negligence, or from trespasses."

¹ Connecticut. Healey v. New Haven, 49 Conn. 394 (1881).

Georgia. Moore v. Atlanta, 70 Ga. 611 (1883).

Indiana. Wabash v. Alber, 88 Ind. 428 (1882).

Iowa. Noyes v. Mason City, 53 Ia. 418 (1880), (5 N. W. Rep. 593); Phillips v. Council Bluffs, 63 Ia. 576 (1884), (19 N. W. Rep. 672).

Maryland. Gregg v. Baltimore, 56 Md. 256 (1881).

Massachusetts. Burr v. Leicester, 121 Mass. 241 (1876); Lane v. Boston, 125 Mass. 519 (1878).

Minnesota. McCarthy v. St. Paul, 22 Minn. 527 (1876).

Nebraska. Harmon v. Omaha, 17 Neb. 548 (1885), (23 N. W. Rep. 503).

Pennsylvania. Pusey v. Allegheny, 98 Pa. St. 522 (1881).

Wisconsin. Tyson v. Milwaukee, 50 Wis. 78 (1880), (5 N. W. Rep. 914).

that power may involve peculiar hardships; that it may impose unusual and unavoidable burdens upon abutting landowners who have improved their property in good faith. This consideration appears to furnish the key to the Ohio doctrine.

It is held, in the first place, that the owner of unimproved property, and the property owner who has not used reasonable care and judgment in making his improvements with reference to the right of municipal corporations to make a reasonable and proper grade, are both alike not entitled to compensation for injuries occasioned by the exercise by such corporations of the power to grade and improve their streets and highways, provided reasonable care and skill were exercised in order to prevent damage.¹ The reason of this rule against these two classes of property owners is stated to be because those of the first class — the owners of unimproved property — are presumed to purchase their lots with a view to a future improvement of the street in such a reasonable manner as the public authorities may deem expedient; because those of the second class — the negligent and indiscreet property owner — cannot make the corporation responsible for their own carelessness and indiscretion, if by ordinary care and discretion they might have anticipated the grade.

Up to this point the practical effect of the Ohio doctrine differs little, if at all, from that reached by the decisions in those jurisdictions where the usual rule is applied. But beyond this point there is a wide difference. The idea that the power to grade and improve is in such manner a continuing power that it may be exercised a second or a third time without regard to the improvements that the abutting lot owners have made in

¹ *Crawford v. Delaware*, 7 Oh. St. 459 (1857).

good faith, and with the same immunity as in the first instance if the public welfare and convenience demand it, is emphatically repudiated. Instead the rule is laid down that if the grade of a street has been fixed by the municipal authorities, and an abutting property owner has in good faith erected a building upon his lot with a view to the established grade, and the corporation afterwards cuts down the grade of the street for the convenience and welfare of the public, such a property owner has a remedy at common law for the injury that he may suffer thereby, even though the corporation exercised proper care and skill in executing the work, and did not exceed the authority conferred upon it.¹

This rule is based upon the theory that an abutting lot owner in such a case has acquired a certain right of property in the street as incident to his lot; a sort of easement appendant to the lot. Hence any change in grade in the street amounts, on this theory, to an invasion of a private right, which is in effect equivalent to a taking of private property for a public use. The case is thus brought within the spirit, at least, of that provision of the constitution which requires compensation to be given for private property taken for public uses. All this is made very clear by Mr. Justice Swan in *Crawford v.*

¹ *McCombs v. Akron*, 15 Oh. 474 (1846), overruling *Hickox v. Cleveland*, 8 Oh. 543 (1838); *Crawford v. Delaware*, 7 Oh. St. 459 (1857); *Cincinnati, etc. Street Ry. Co. v. Cumminsville*, 14 Oh. St. 523 (1863); *Cincinnati v. Penny*, 21 Oh. St. 499 (1871); *Youngstown v. Moore*, 30 Oh. St. 133 (1876); *Akron v. Chamberlain Company*, 34 Oh. St. 328 (1878); *Keating v. Cincinnati*, 38 Oh. St. 141 (1882).

But see *Scovil v. Geddings*, 7 Oh. 211 (1836), which holds that the commissioners who did the work of grading a street were not liable for the consequential damages resulting therefrom. This decision, says Mr. Justice Swan in *Crawford v. Delaware*, 7 Oh. St. 459 (1857), at page 464, "has never been overruled, and remains the law of this state."

Delaware, where he says: "Distinct from the right of the public to use a street, is the right and interest of the owners of lots adjacent. The latter have a peculiar interest in the street, which neither the local nor the general public can pretend to claim: a private right of the nature of an incorporeal hereditament, legally attached to their contiguous grounds, and the erections thereon; an incidental title to certain facilities and franchises, assured to them by contracts and by law, and without which their property would be comparatively of little value. This easement, appendant to the lots, unlike any right of one lot owner in the lot of another, is as much property as the lot itself."¹

§ 66. Where the work of constructing Streets and Highways is done negligently. — The actual manual labor involved in grading and improving streets and highways is purely ministerial in character. It involves the exercise of no judgment or discretion on the part of the municipal authorities; it requires no deliberation for its accomplishment. When therefore the manual work of construction begins, the reason for the application of the usual rule of immunity ceases, and municipal corporations are held responsible in damages for the consequences of their negligence or lack of due skill in performing the actual work of grading and improving.²

§ 67. Where the Work of constructing Streets and Highways results in a taking of Private Property. — The immunity extended by the common law to the consequences resulting from the exercise of legislative or judicial

¹ *Crawford v. Delaware*, 7 Oh. St. 459 (1857), at page 469.

² *Roberts v. Chicago*, 26 Ill. 249 (1861); *Nevins v. Peoria*, 41 Ill. 502 (1866); *Princeton v. Gieske*, 93 Ind. 102 (1883); *Hendershott v. Ottumwa*, 46 Ia. 658 (1877); *Perry v. Worcester*, 6 Gray (Mass.), 544 (1856); *Nichols v. St. Paul*, 44 Minn. 494 (1890), (47 N. W. Rep. 168); *Wegmann v. Jefferson*, 61 Mo. 55 (1875); *Meares v. Wilming-*

power is based upon an assumption that such consequences are lawful in character, and that the acts from which they flowed might be lawfully authorized. This assumption obviously cannot be entertained where the acts done are of such a character as to constitute a positive invasion of those individual rights that the constitution guarantees. Legislative sanction cannot, in such cases, afford a protection to the corporation engaged in performing such acts from the legal consequences of them. It is generally held, therefore, that if the acts of a municipal corporation, done in the course of grading and improving its streets and highways, are of such a nature as to amount to a taking of the abutting lot owner's property or property rights, even though they may have been done with proper care and skill, the corporation is bound to compensate him therefor.¹ Thus, where the result of the work is to collect surface water and pour it in a body upon the plaintiff's premises, or to deposit mud or other foreign substances thereon, the corporation is bound to respond in damages.² Cases of this class are, however, to be distinguished from those where the consequence of the work is simply to cause surface water to flow on to the plaintiff's premises, though not to collect and discharge it thereon in a body. In the latter class of cases

ton, 9 Ired. L. (N. C.) 73 (1848); *Easton v. Neff*, 102 Pa. St. 474 (1883).

In *North Vernon v. Voegler*, 103 Ind. 314 (1885), (2 N. E. Rep. 821), the defendant city was held liable for negligence in devising the plan in accordance with which the grading of a street was done. As to this point see also *Gould v. Topeka*, 32 Kan. 485 (1884), (4 Pac. Rep. 822).

¹ *Kemper v. Louisville*, 14 Bush (Ky.), 87 (1878).

² *Nevins v. Peoria*, 41 Ill. 502 (1866); *Aurora v. Reed*, 57 Ill. 29 (1870); *Bloomington v. Brokaw*, 77 Ill. 194 (1875); *Inman v. Tripp*, 11 R. I. 520 (1877).

the usual rule of immunity ordinarily affords complete protection to the corporation.¹

§ 68. **Where the Corporation, in the Work of constructing Streets and Highways, fails to follow the Authority given.** — In order that legislative sanction may be effectual as a protection to municipal corporations from responsibility for acts done, it is essential that the authority conferred should be strictly followed. Otherwise the acts done rest upon no basis of authority, and are consequently without legal justification. Hence if a municipal corporation, in the course of grading and improving its streets and highways, fails to comply with the provisions contained in its charter or in the statute from which it derives its authority to perform the work, it is responsible for the injurious consequences of that work.²

PART II.

The Liability growing out of their Maintenance.

A. THE LIABILITY.

§ 69. **The Common Law Rule as to Quasi Corporations.** — As has been already noted,³ pure quasi corporations are

¹ Clark *v.* Wilmington, 5 Harr. (Del.) 243 (1849); Roll *v.* Augusta, 34 Ga. 326 (1866); Cummins *v.* Seymour, 79 Ind. 491 (1881); Russell *v.* Burlington, 30 Ia. 262, 267 (1870); Morris *v.* Council Bluffs, 67 Ia. 343 (1885), (25 N. W. Rep. 274); Flagg *v.* Worcester, 13 Gray (Mass.), 601 (1859); Lee *v.* Minneapolis, 22 Minn. 13 (1875); St. Louis *v.* Gurno, 12 Mo. 414 (1849); Stewart *v.* Clinton, 79 Mo. 603 (1883); Kavanagh *v.* Brooklyn, 38 Barb. (N. Y.) 232 (1862); Wakefield *v.* Newell, 12 R. I. 75 (1878).

² Delphi *v.* Evans, 36 Ind. 90 (1871); Crossett *v.* Janesville, 28 Wis. 420 (1871).

In Delphi *v.* Evans, 36 Ind. 90 (1871), the city cut down the grade of one street for the purpose of obtaining gravel with which to raise

³ See § 3, *ante.*

simply territorial and political divisions of the state,—the agencies which the state has brought into existence without the consent of their inhabitants, that it may through them the better perform locally those duties which it owes to all citizens alike. The duty of maintaining in proper condition the highways within their limits stands upon exactly the same footing as all the other duties which the state performs through these agencies. It is, so far as quasi corporations are concerned, a purely public, governmental duty to be performed by them for the general welfare of the whole public, and not for the private advantage of the particular section. Little difference in opinion as to this point is to be found either in England or in this country. And since the decision in England in 1788 of *Russell v. The Men of Devon*,¹ it has generally been conceded to be the rule that counties and other quasi corporations are not liable to a private action at the suit of a party injured by reason of the neglect of their officials to keep their highways in a reasonably safe condition, unless such action is expressly given by statute.

the grade of another street, without first passing an order for the improvement of the first street. It was held that the city had no right to cut down the grade of the first street under such circumstances, and was liable for the damages resulting therefrom. If it had made an order and prepared a plan for the improvement of both streets, then the usual rule of immunity would have applied.

¹ 2 Term Rep. 667 (1788).

² *Alabama.* Covington County *v.* Kinney, 45 Ala. 176 (1871); *Askew v. Hale County*, 54 Ala. 639 (1875).

Arkansas. Granger *v.* Pulaski County, 26 Ark. 37 (1870).

California. Huffman *v.* San Joaquin County, 21 Cal. 426 (1863).

Colorado. El Paso County *v.* Bish, 18 Col. 474 (1893), (33 Pac. Rep. 184).

Connecticut. Chidsey *v.* Canton, 17 Conn. 475 (1846).

Idaho. Davis *v.* Ada County, 47 Pac. Rep. 93 (1896).

Illinois. Waltham *v.* Kemper, 55 Ill. 346 (1870), overruling South

The only decisions at variance with this general rule, which represent the present state of the law, are to be found in Iowa, Maryland, and Pennsylvania. In Maryland and Pennsylvania public corporations of this class are held liable at common law on general principles, for

Ottawa v. Foster, 20 Ill. 296 (1858); *White v. Bond County*, 58 Ill. 297 (1871).

Indiana. *Fulton County v. Rickel*, 106 Ind. 501 (1886), (7 N. E. Rep. 220); *Abbett v. Johnson County*, 114 Ind. 61 (1887), (16 N. E. Rep. 127).

Iowa. *Soper v. Henry County*, 26 Ia. 264 (1868).

Kansas. *Eikenberry v. Township of Bazaar*, 22 Kan. 556 (1879); *Marion County v. Riggs*, 24 Kan. 255 (1880).

Kentucky. *Wheatly v. Mercer*, 9 Bnsh, 704 (1873).

Louisiana. *King v. Police Jury*, 12 La. An. 858 (1857).

Massachusetts. *Mower v. Leicester*, 9 Mass. 247 (1812).

Mississippi. *Sutton v. Board of Police*, 41 Miss. 236 (1866).

Missouri. *Reardon v. St. Louis County*, 36 Mo. 555 (1865); *Clark v. Adair County*, 79 Mo. 536 (1883).

New Hampshire. *Farnum v. Concord*, 2 N. H. 392 (1821); *Wheeler v. Troy*, 20 N. H. 77 (1849), is *contra*. But in *Eastman v. Meredith*, 36 N. H. 284 (1858), at page 300, the court questioned the correctness of the decision in *Wheeler v. Troy*, and expressed itself as feeling at liberty to reverse it, but was not called upon to do so at that time. The doctrine of *Farnum v. Concord* was, however, reaffirmed.

New Jersey. *Chosen Freeholders v. Strader*, 18 N. J. L. 108 (1840).

New York. *Morey v. Newfane*, 8 Barb. 645 (1850).

North Carolina. *White v. Chowan County*, 90 N. C. 437 (1884).

North Dakota. *Vail v. Amenia*, 4 N. Dak. 239 (1894), (59 N. W. Rep. 1092).

Oregon. *Templeton v. Linn County*, 22 Oreg. 313 (1892), (29 Pac. Rep. 795).

South Dakota. *Bailey v. Lawrence County*, 5 S. Dak. 393 (1894), (59 N. W. Rep. 219).

Tennessee. *Wood v. Tipton County*, 7 Baxter, 112 (1874).

Vermont. *Baxter v. Winooski Turnpike Co.*, 22 Vt. 114, 123 (1849), *semble*.

Washington. *Clark v. Lincoln County*, 1 Wash. 518 (1889), (20 Pac. Rep. 576).

England. *Russell v. Men of Devon*, 2 Term Rep. 667 (1788).

injuries due to defects in their highways;¹ while in Iowa their common law liability relative to highways is restricted to the neglect to maintain in reasonably safe condition county bridges.² This latter rule was formerly the law in Indiana,³ but in 1895 it was re-examined by the Supreme Court and overruled.⁴

§ 70. The Common Law Rule as to Municipal Corporations proper. — The question whether or not municipal corporations proper are liable at the suit of a private individual injured by a defect in their public ways, in the absence of a statute expressly declaring such liability, has called forth much elaborate, and in some instances heated, discussion. The practical result of it all may be summed up in the statement that the courts of highest resort in a large majority of the states have recognized and repeatedly enforced the doctrine that municipal corporations proper, having under their charters or by statute provision the exclusive care and control of the streets and highways within their territory, and having at their disposal the means for maintaining them in proper condition, are responsible at common law for injuries arising from their neglect to keep them reasonably safe for public

¹ *Anne Arundel County v. Duckett*, 20 Md. 468 (1863); *Calvert County v. Gibson*, 36 Md. 229 (1872); *Baltimore County v. Baker*, 44 Md. 1 (1875); *Hartford County v. Hamilton*, 60 Md. 340 (1883); *Prince George's County v. Burgess*, 61 Md. 29 (1883); *Dean v. New Milford Township*, 5 W. & S. (Pa.) 545 (1843); *Burrell Township v. Uncapher*, 117 Pa. St. 353 (1887), (11 Atl. Rep. 619); *Shadler v. Blair County*, 136 Pa. St. 488 (1890), (20 Atl. Rep. 539).

² *Wilson v. Jefferson County*, 13 Ia. 181 (1862); *Huff v. Poweshiek County*, 60 Ia. 529 (1883), (15 N. W. Rep. 418). For additional cases, see page 4, note 1, *ante*.

³ *House v. Montgomery County*, 60 Ind. 580 (1878), and cases cited page 4, note 1, *ante*.

⁴ *Jasper County v. Allman*, 142 Ind. 573 (1895), (42 N. E. Rep. 206).

travel.¹ Especially in the Middle and Western States are the authorities quite uniform in support of this doctrine.

Alabama. *Smoot v. Wetumpka*, 24 Ala. 112 (1854); *Albrittin v. Huntsville*, 60 Ala. 486 (1877); *Selma v. Perkins*, 68 Ala. 145 (1880).

Colorado. *Denver v. Dunsmore*, 7 Col. 328 (1884), (3 Pac. Rep. 705); *Boulder v. Niles*, 9 Col. 415 (1886), (12 Pac. Rep. 632).

Dakota. *Larson v. Grand Forks*, 3 Dak. 307 (1884) (19 N. W. Rep. 414).

Delaware. *Anderson v. Wilmington*, 8 Houst. 516 (1889), (19 Atl. Rep. 509).

Florida. *Tallahassee v. Fortune*, 3 Fla. 19 (1850); *Jacksonville v. Drew*, 19 Fla. 106 (1882).

Georgia. *Parker v. Macon*, 39 Ga. 725 (1869); *Rome v. Dodd*, 58 Ga. 238 (1877); *Greensboro v. McGibbony*, 93 Ga. 672 (1894), (20 S. E. Rep. 37).

Illinois. *Browning v. Springfield*, 17 Ill. 143 (1855); *Sterling v. Thomas*, 60 Ill. 264 (1871); *Chicago v. Keefe*, 114 Ill. 222 (1885), (2 N. E. Rep. 267).

Indiana. *Grove v. Fort Wayne*, 45 Ind. 429; *Worthington v. Morgan*, 17 Ind. App. 603 (1897), (47 N. E. Rep. 235).

Iowa. *Case v. Waverly*, 36 Ia. 545 (1873); *Montgomery v. Des Moines*, 55 Ia. 101 (1880), (7 N. W. Rep. 421); *Clark v. Epworth*, 56 Ia. 462 (1881), (9 N. W. Rep. 359); *Beazan v. Mason City*, 58 Ia. 233 (1882), (12 N. W. Rep. 279).

Kansas. *Topeka v. Tuttle*, 5 Kan. 311 (1870).

Louisiana. *O'Neill v. New Orleans*, 30 La. An. (Part I.) 220 (1878).

Maryland. *Baltimore v. Marriott*, 9 Md. 160 (1856).

Minnesota. *Shartle v. Minneapolis*, 17 Minn. 308 (1871); *Kellogg v. Janesville*, 34 Minn. 132 (1885), (24 N. W. Rep. 359); *Young v. Waterville*, 39 Minn. 196 (1888), (39 N. W. Rep. 97).

Mississippi. *Bell v. West Point*, 51 Miss. 262 (1875).

Missouri. *Blake v. St. Louis*, 40 Mo. 569 (1867); *Halpin v. Kansas City*, 76 Mo. 335 (1882); *Vogelgesang v. St. Louis*, 139 Mo. 127 (1897), (40 S. W. Rep. 653).

Montana. *Sullivan v. Helena*, 10 Mont. 134 (1890), (25 Pac. Rep. 94); *McCune v. Missoula*, 10 Mont. 146 (1890), (25 Pac. Rep. 442).

Nebraska. *Omaha v. Olmstead*, 5 Neb. 446 (1877); *Wahoo v. Reeder*, 27 Neb. 770 (1889), (43 N. W. Rep. 1145).

Nevada. *McDonough v. Virginia City*, 6 Nev. 90 (1870).

New York. *Weet v. Brockport*, 16 N. Y. 161 (1857); *Davenport v. Ruckman*, 37 N. Y. 568 (1868); *Clemence v. Auburn*, 66 N. Y. 334

As uniform in opposition to it are the decisions in the New England States, where, as well as in several other

(1876); *Cohen v. Mayor, etc. of New York*, 113 N. Y. 532 (1889), (21 N. E. Rep. 700); *Bishop v. Goshen*, 120 N. Y. 337 (1890), (24 N. E. Rep. 720).

North Carolina. *Bunch v. Edenton*, 90 N. C. 431 (1884).

North Dakota. *Ludlow v. Fargo*, 3 N. Dak. 485 (1893), (57 N. W. Rep. 506).

Ohio. *Dayton v. Pease*, 4 Oh. St. 80 (1854); *Shelby v. Clagett*, 46 Oh. St. 549 (1889), (22 N. E. Rep. 407).

Oregon. *Sheridan v. Salem*, 14 Oreg. 328 (1886), (12 Pac. Rep. 925); *Farquar v. Roseburg*, 18 Oreg. 271 (1890), (22 Pac. Rep. 1103).

Pennsylvania: *Erie v. Schwingle*, 22 Pa. St. 384 (1853); *Fritsch v. Allegheny*, 91 Pa. St. 226 (1879); *Brookville v. Arthurs*, 130 Pa. St. 501 (1889), (18 Atl. Rep. 1076).

Tennessee. *Memphis v. Lasser*, 9 Humph. 757 (1849); *Knoxville v. Bell*, 12 Lea, 157 (1883).

Texas. *Galveston v. Posnainsky*, 62 Tex. 118 (1884), distinguishing *Navasota v. Pearce*, 46 Tex. 525 (1877); *Klein v. Dallas*, 71 Tex. 280 (1888), (8 S. W. Rep. 90).

Utah. *Levy v. Salt Lake City*, 3 Utah, 63 (1881), (1 Pac. Rep. 160), *semble*.

Virginia. *Noble v. Richmond*, 31 Gratt. 271 (1879); *Orme v. Richmond*, 79 Va. 86 (1884).

Washington. *Hutchinson v. Olympia*, 2 Wash. Ter. 314 (1884), (5 Pac. Rep. 606); *Sutton v. Snohomish*, 11 Wash. 24 (1895), (39 Pac. Rep. 273).

West Virginia. *Wilson v. Wheeling*, 19 W. Va. 323 (1882); *Curry v. Mannington*, 23 W. Va. 14 (1883).

United States. *Weightman v. Washington*, 1 Black, 39 (1861); *Barnes v. District of Columbia*, 91 U. S. 540 (1875); *Evanston v. Gunn*, 99 U. S. 660 (1878); *Delger v. St. Paul*, 14 Fed. Rep. 567 (1882).

In *Greensboro v. McGibbony*, 93 Ga. 672 (1894), (20 S. E. Rep. 37), it was held that although the city's charter might not, in express terms, confer the power or impose the duty to keep its streets in proper condition, yet since it granted the power to raise money for the support of the government and for other purposes, and the city authorities had exercised corporate functions over the streets, it would be liable to a person injured by its failure to keep them in repair, even though no such right of action was given by its charter or by statute.

jurisdictions, the doctrine is firmly established that there is no common law liability in such cases.¹

§ 71. The Theory of the Common Law Liability. — Perhaps the most commonly accepted theory — certainly the only one that has received much serious attention from the courts, upon which it has been attempted to explain why municipal corporations proper should be held liable at common law for a neglect to maintain their highways in reasonably safe condition, when quasi corporations are held not to be liable for a neglect of precisely the same duty — is that of a contract growing out of the change in the character of the corporation. The quasi corporation, or a territorial section of it, according to this theory, by voluntarily accepting a special charter or by organizing of its own motion under a general law, impliedly con-

¹ *Arkansas.* *Arkadelphia v. Windham*, 49 Ark. 139 (1886), (4 S. W. Rep. 450); *Ft. Smith v. York*, 52 Ark. 84 (1889), (12 S. W. Rep. 157).

California. *Winbigler v. Los Angeles*, 45 Cal. 36 (1872); *Arnold v. San José*, 81 Cal. 618 (1889), (22 Pac. Rep. 877).

Connecticut. *Chidsey v. Canton*, 17 Conn. 475 (1846); *Hewison v. New Haven*, 37 Conn. 475 (1871).

Maine. *Sanford v. Augusta*, 32 Me. 536 (1851); *Mitchell v. Rockland*, 52 Me. 118 (1860).

Massachusetts. *Mower v. Leicester*, 9 Mass. 247 (1812); *Hill v. Boston*, 122 Mass. 344, 357 (1877), *semble*.

Michigan. *Detroit v. Blackeby*, 21 Mich. 84 (1870); *McCutcheon v. Homer*, 43 Mich. 483 (1880), (5 N. W. Rep. 668); *McArthur v. Saginaw*, 58 Mich. 357 (1885), (25 N. W. Rep. 313).

New Hampshire. *Farnum v. Concord*, 2 N. H. 392 (1821); *Clark v. Manchester*, 62 N. H. 577 (1883), *semble*.

New Jersey. *Pray v. Jersey City*, 32 N. J. L. 394 (1868).

Rhode Island. *Taylor v. Peckham*, 8 R. I. 349 (1866).

South Carolina. *Young v. Charleston*, 20 S. C. 116 (1883).

Vermont. *Baxter v. Winooski Turnpike Co.*, 22 Vt. 114, 123 (1849), *semble*; *Hyde v. Jamaica*, 27 Vt. 443 (1855).

Wisconsin. *Stilling v. Thorp*, 54 Wis. 528, 532 (1882), (11 N. W. Rep. 906), *semble*; *Daniels v. Racine*, 98 Wis. 649 (1898), (74 N. W. Rep. 553).

tracts with the state to faithfully perform all the duties assumed by it, — among them this duty relative to highways — the franchise granted being considered in law sufficient to support this promise; and when clothed with all the power and authority necessary to the performance of this duty, it becomes a perfect obligation, enuring to the benefit of every individual who is interested in its performance.¹ The principle is stated thus in *Weet v. Brockport*:² “ Whenever an individual or a corporation, for a consideration received from the sovereign power, has become bound by covenant or agreement, either express or implied, to do certain things, such individual or corporation is liable, in case of neglect to perform such covenant, not only to a public prosecution by indictment, but to a private action at the suit of any person injured by such negligence.”

This theory has been vigorously attacked by those who deny the existence of any common law liability of public corporations, whether quasi corporations or municipal corporations proper, relative to highways. The impossibility that the act of creation done by the creator — the state — can constitute a contract between it and the being created, is pointed out. And further, it is declared that “it is impossible to find legal warrant for any other ground for distinguishing the liability” of quasi corporations and municipal corporations proper.³ This view is

¹ *Jones v. New Haven*, 34 Conn. 1 (1867); *Waltham v. Kemper*, 55 Ill. 346, 349, 350 (1870); *Weet v. Brockport*, 16 N. Y. 161 (1857); *Conrad v. Ithaca*, 16 N. Y. 158 (1857); *Nelson v. Canistoe*, 100 N. Y. 89 (1885), (2 N. E. Rep. 473); *Weightman v. Washington*, 1 Black (U. S.), 39 (1861).

² 16 N. Y. 161, 163 (1857).

³ *Arkadelphia v. Windham*, 49 Ark. 139 (1886), (4 S. W. Rep. 450); *Hewison v. New Haven*, 37 Conn. 475 (1871); *Detroit v. Blacheby*, 21 Mich. 84 (1870).

ably expressed by Mr. Justice Battle in *Arkadelphia v. Windham*.¹ After stating the rule of non-liability of quasi corporations, he says: "The reason for the application being the same, it is difficult to understand why this rule does not apply and should not be enforced as to incorporated towns and cities. . . . For, like counties, they are a part of the machinery of the state, and are its auxiliaries in the important business of municipal rule and internal administration, and their functions are almost wholly of a public nature. Like counties, their functions, rights and privileges, are under the control of the Legislature, and may be changed, modified or repealed, as a general rule, as the exigencies of the public service or the public welfare demand. Like counties, they can sustain no right or privilege, or their existence, upon anything like a contract between them and the State, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are wholly incompatible with everything of the nature of a compact. The duty of keeping in repair the public highways in their respective limits is imposed on both for the benefit of the public, without any consideration or emolument received by either. Before the incorporation of the town or city the county was charged with the duty of keeping its highways in repair. When the town or city becomes incorporated that duty is transferred to the town or city, from one governmental agency to another. The object, purpose, reason and character of the duty are the same in both cases. This being true, there can be no reason why the town or city shall be any more liable to a private action for neglect to perform this duty than the county previously was, unless the statute transferring the duty

¹ 49 Ark. 139 (1886), at page 140 (4 S. W. Rep. 450).

clearly manifests an intention in the Legislature to impose this liability."

It may be granted, as pointed out in this quotation, that the change in character from quasi corporation to municipal corporation proper affords no reasonable ground upon which to base a difference in liability. The contract theory, if it proves anything, appears to prove too much, for upon it a liability could be established for the breach of any duty undertaken by a municipal corporation proper without regard to the nature of that duty; and this, of course, no court has ever asserted.

But is it entirely true that "the object, purpose, reason and character of the duty are the same in both cases?" May there not be a difference in this duty in these particulars when it rests upon a municipal corporation proper and when it rests upon a quasi corporation? And may not such a difference, if it exists, afford a ground for this distinction in liability?

The immunity of a quasi corporation stands upon the ground, not that it is a governmental agency, but that its duty relative to highways is public and governmental; for though a governmental agency, it will be liable to a private action at common law at the suit of any person who may suffer special damage from the negligent performance of any duty that is not public and governmental in nature.¹ Its duty relative to highways, it is submitted, is public and governmental, because, by reason of the wide extent of its territory, the fewness of its inhabitants, the simplicity of the life within its limits, and the exceeding smallness of the volume of business there carried on, the advantage and benefit to be derived from safe and convenient highways enures mainly to the public as a whole, rather than to the particular community. Further-

¹ See page 7 and citations in note 3.

more, county highways are largely to facilitate transit and communication from one part of the state to another, rather than to serve the convenience of the particular county. The public as a whole has thus the primary interest, and the county in its corporate capacity, only a secondary interest in their proper maintenance. In the case of the incorporated city or town, however, all the conditions are different. The extent of territory is much smaller; the number of citizens is vastly increased; the life within them is correspondingly complex in its relations and needs; and the volume of business is immensely increased. Its highways are not in the main to promote transit and communication from place to place within the state, but to facilitate the business and social relations of its own citizens and of those who can be induced to come in for the purpose of entering into business and social relations with them. Safe and convenient streets in the incorporated city or town are thus mainly and primarily for the benefit of them in their private capacity, and only remotely for the advantage of the general public. It may be true that they derive no gain or emolument directly from the performance of this duty, but it is submitted that they do indirectly through the increased prosperity that comes to them by making it more safe and convenient for its citizens to pass and repass in the transaction of business, and by thus holding out greater inducements to others to frequent them. In short, the duty of an incorporated city or town to keep its highways in a reasonably safe condition more nearly approaches in object, purpose, reason and character to their duty to maintain sewers and like municipal improvements, than to a public, governmental duty. If all this be sound, it may afford a ground for the liability of the municipal corporation proper relative to highways which can be

reconciled with the rule of non-liability of the quasi corporation.

§ 72. The Statutory Liability. — In the majority of the states where the existence of a common law liability has been denied, and as well in some states where the common law rule has been recognized, statutes have been enacted imposing upon municipal corporations a liability for injuries due to a defective condition of their highways. Since in enforcing this statutory liability much oftentimes turns upon the wording of the act creating it, it may be useful to here note the terms used in the various acts. It is to be observed in the beginning that in all of them, in some form of words, a right of action is given to "any person" who is injured "in person or property;" in Michigan alone is the right of action in terms limited to "any person or persons sustaining bodily injury." In Connecticut, any person injured "by means of a defective road or bridge may recover damages from the party bound to keep it in repair."¹ In Maine, any person injured "through any defect or want of repair or sufficient railing, in any highway, town way, causeway or bridge may recover for the same."² In Massachusetts, any person injured "through a defect or want of repair or of sufficient railing in or upon a highway, town way, causeway, or bridge" may recover "the amount of damage sustained."³ In Michigan, any person injured "upon any of the public highways or streets in this state, by reason of the neglect to keep such highways or streets, and all bridges, sidewalks, cross-walks and culverts on the same in reasonable repair, and in condition reasonably safe and fit for travel," may recover damages.⁴ In New

¹ Gen. Sts., 1888, § 2673.

² Rev. Sts., 1883, c. 18, § 80.

³ Pub. Sts., 1882, c. 52, § 18, and acts in amendment thereof.

⁴ How. Annot. Stat. Supp., 1883-1890, §§ 1442-1446 h.

Hampshire, towns are made liable for damages happening to any person "travelling upon a highway or bridge thereon, by reason of any obstruction, defect, insufficiency, or want of repair which renders it unsuitable for the travel thereon."¹ In New Jersey, "if any damage shall happen to any person or persons" by means "of the insufficiency or want of repairs of any public road in any of the townships of this state, the person or persons sustaining such damage" may recover therefor.² In New York, "every town shall be liable for all damages to person or property, sustained by reason of any defect in its highways or bridges, existing because of the neglect of any commissioner of highways of such town."³ In Rhode Island, towns are liable to any person who may in any wise suffer injury by reason of a "neglect to keep in good repair its highways and bridges."⁴ In South Carolina, any person receiving injury "through a defect or in the negligent repair of a highway, causeway or bridge may recover, in an action against the county, the amount of actual damage sustained."⁵ In West Virginia, "any person who sustains an injury to his person or property by reason of a public road, or bridge, in a county, or by reason of a public road, bridge, street, sidewalk or alley in an incorporated city, village or town, being out of repair, may recover all damages sustained by him by reason of such injury."⁶ In Vermont, "if damage occurs to a person, or his property, by reason of the insufficiency or want of repair of any bridge or culvert which the town is liable to keep in repair, the person sustaining damage

¹ Pub. Sts., 1891, c. 76, § 1.

² Gen. Sts., 1895, p. 2844, pars. 192, 193

³ Laws, 1890, c. 568, § 16, p. 1181.

⁴ Gen. Laws, 1896, c. 72, §§ 11, 12.

⁵ Civ. Sts., 1893, § 1169.

⁶ Code, 1891, c. 43, § 53. This statute was first enacted in 1887.

may recover the same " from such town.¹ In Wisconsin, if any damage shall happen to any person "by reason of the insufficiency or want of repair of any bridge, sluice-way or road in any town, city or village the person sustaining such damage shall have a right to sue for and recover the same against any such town, city or village."²

In construing these statutes, it is generally considered by the courts that the legislature intended to put no greater burden upon the corporation than the plain meaning of the language used indicates. In a word, they are usually construed strictly in favor of the defendant. It is held, therefore, that the liability created by them is not to be extended by construction,³ nor yet by contract;⁴ nor, on the other hand, to be narrowed by implication.⁵

§ 73. The Source of the Common Law Liability. — Whatever may be the legal principle upon which it ultimately rests, or if it rests upon no legal principle at all, it seems safe to say that the common law liability of municipal corporations to respond in damages for injuries caused by a defective condition of the streets is directly deducible from the duty which grows out of the possession of that

¹ Stats., 1894, § 3490. In 1880, the statute of Vermont that imposed a liability for defective highways was repealed. See Laws 1880, No. 62, amended by Laws 1882, No. 13. Hence there is now no statutory liability for defective highways, except such parts of them as consist of bridges and culverts. See *Willard v. Sherburne*, 59 Vt. 361 (1887), (8 Atl. Rep. 735); *Wilkins v. Rutland*, 61 Vt. 336, 339 (1889), (17 Atl. Rep. 735).

² Stats., 1898, § 1339.

³ *Bartram v. Sharon*, 71 Conn. 686, 694 (1899), (43 Atl. Rep. 143); *Moulton v. Sanford*, 51 Me. 127, 129 (1862); *Brown v. Skowhegan*, 82 Me. 273, 276 (1890), (19 Atl. Rep. 399); *Detroit v. Putnam*, 45 Mich. 263 (1881), (7 N. W. Rep. 815); *Taylor v. Peckham*, 8 R. I. 349 (1866).

⁴ *Rouse v. Somerville*, 130 Mass. 361 (1881).

⁵ *Davis v. Leominster*, 1 Allen (Mass.) 182 (1861); *Noyes v. Gardner*, 147 Mass. 505, 508 (1888), (18 N. E. Rep. 423).

authority over their streets which is vested in them by charter or statutory provision.¹

§ 74. The Nature and Extent of the Common Law Liability. — The duty of municipal corporations relative to highways is not only the source of their common law liability, but as well its measure. Speaking in broad general terms, it is not greater, nor less, but simply commensurate with that duty. By this standard of measurement it appears, then, that this liability is not absolute. The mere existence of a defect in the highway from which a traveller sustains injury does not alone give him a cause of action. He must go a step further, and show that the existence of that defect was due to negligence on the part of the defendant corporation. Negligence is thus the sole basis and extent of the liability: it does not arise unless and until that appears as an element in the case.²

The liability, however, which arises from a breach of this duty rests upon the corporation itself, and cannot be shifted or avoided by any arrangement with third persons. In this regard it is absolute. It affords no defence, therefore, to show that the existence of the defect was due to the negligence of some person who had assumed the duty of keeping in proper repair that portion of the highway where the accident happened.³

B. THE INJURED PERSON.

§ 75. The Injured Person must show Special Damage. — In order to maintain a private action, either at common

¹ See *Albrittin v. Huntsville*, 60 Ala. 486 (1877); *Savannah v. Waldner*, 49 Ga. 316, 323 (1873); *Rehberg v. Mayor, etc. of New York*, 91 N. Y. 137, 142 (1883).

² *Monmouth v. Sullivan*, 8 Ill. App. 50 (1880); *Hunt v. Mayor, etc. of New York*, 109 N. Y. 134, 141 (1888), (16 N. E. Rep. 320); *Village v. Kallagher*, 52 Oh. St. 183 (1894), (39 N. E. Rep. 144).

³ *Blake v. St. Louis*, 40 Mo. 569, 571 (1867).

law or under statutes, for an injury caused by the defective condition of a highway, the plaintiff must show that such injury was peculiar to himself, and not common to, or shared in by, the public generally. In the common language of the cases, he must show that he has sustained some special and peculiar damage. And the authorities generally agree that to constitute such speelial and peculiar damage, the injury suffered must differ in kind, and not merely in degree, from that to which all citizens are exposed. Hence it is commonly held that it constitutes no ground of action against a municipal corporation that, by reason of the defective condition of a highway, a person was subjected to personal inconvenience, or was compelled to travel a greater distance, or was delayed or turned back in his journey.¹ Even the faet that a person has suffered a loss of trade because of the failure of the corporation to keep the highway upon which his business premises front in proper condition for travel, has been held not to be such special damage as will entitle him to maintain a private action.²

¹ Sohn *v.* Cambern, 106 Ind. 302 (1885), (6 N. E. Rep. 813); Brant *v.* Plumer, 64 Ia. 33 (1884), (19 N. W. Rep. 842); Houck *v.* Wachter, 34 Md. 265 (1870); Holman *v.* Townsend, 13 Met. (Mass.) 297 (1847); Smith *v.* Dedham, 8 Cush. (Mass.) 522 (1851); Griffin *v.* Sanbornton, 44 N. H. 246 (1862); Gold *v.* Philadelphia, 115 Pa. St. 184 (1886), (8 Atl. Rep. 386).

² Willard *v.* Cambridge, 3 Allen (Mass.), 574 (1862); Gold *v.* Philadelphia, 115 Pa. St. 184 (1886), (8 Atl. Rep. 386); Hale *v.* Weston, 40 W. Va. 313 (1895), (21 S. E. Rep. 742).

But where it appeared that in consequence of the construction of a sewer a street was obstructed for several months, during a considerable part of which time no work on the sewer was done, and that because of this unnecessary prolongation of the work the plaintiffs, who were merchants having a place of business on the street, suffered a material loss of trade, it was held that there was peculiar damage for which the plaintiffs were entitled to recover. Williams *v.* Tripp, 11 R. I. 447 (1877).

In the New England states municipal corporations are commonly

§ 76. The Injured Person must be making a Proper Use of the Highway. — It is essential to the right of a person to maintain an action against a municipal corporation for an injury suffered by reason of the defective condition of a highway that it should appear that he was making a proper and legitimate use of the highway at the time of the accident. There seems to be no controversy in the cases upon this point, whatever differences may be found upon the question what is a proper and legitimate use of a public highway.

In those states where the liability relative to highways is purely statutory, it is commonly held that municipal corporations are bound to keep their highways in a reasonably safe condition for the purpose of travel and of travel only. Hence in order to bring his case within this rule it is incumbent upon the injured person to show that he was, at the time of the accident, a traveller upon the highway.¹ If it appears, therefore, that he was injured while outside the travelled path, even though within the way as located,² or while using the highway solely for

held not to be liable for such damages as the loss of services, expense of nursing, and the like, which may result to a person because of injuries suffered by wife or child by reason of defects in a highway. *Chidsey v. Canton*, 17 Conn. 475 (1846); *Reed v. Belfast*, 20 Me. 246 (1841); *Harwood v. Lowell*, 4 *Cush.* (Mass.) 310 (1849).

¹ *Maine*. *Leslie v. Lewiston*, 62 Me. 468 (1873); *Philbrick v. Pittston*, 63 Me. 477 (1874); *Brown v. Skowhegan*, 82 Me. 273 (1890), (19 Atl. Rep. 399).

Massachusetts. *Stickney v. Salem*, 3 *Allen*, 374 (1862); *Hunt v. Salem*, 121 Mass. 294 (1876).

Michigan. *Tatman v. Benton Harbor*, 115 Mich. 695 (1898), (74 N. W. Rep. 187).

New Hampshire. *Ball v. Winchester*, 32 N. H. 435 (1855); *Hardy v. Keene*, 52 N. H. 370 (1872).

Vermont. *Sykes v. Pawlet*, 43 Vt. 446 (1871).

Wisconsin. *Harper v. Milwaukee*, 30 Wis. 365, 371 (1872); *Hawes v. Fox Lake*, 33 Wis. 438 (1873).

² *Brown v. Skowhegan*, 82 Me. 273 (1890), (19 Atl. Rep. 399);

some other purpose than that of travel,¹ there is ordinarily no liability upon the corporation.

A somewhat liberal interpretation, however, is given to the term "traveller," as used in the above rule. It does not necessarily include only those persons who were at the moment of the accident engaged simply and solely in passing from one point to another upon the highway. It may also include persons who were at that moment doing some other act. The test to be applied in order to determine whether or not an injured person was a traveller at the time when he received his injury, so far as any test can be laid down, is, whether his acts at that time could reasonably be regarded as the natural and ordinary incidents of travel upon the highway and as consistent with an intention on his part to continue upon and over the highway for the usual and proper purposes of travel. Guided by some such test as this, it has been held that the mere doing of acts in play while passing along the street,² or the mere stopping for a few moments to watch a parade,³ or to watch boys at play,⁴ or to pick berries by the side of the road,⁵ there being in each case an intention to proceed along the highway for some purpose, would not deprive the injured person of the character of a traveller. But on the other hand it has been held that if he stops in the highway for a time to engage in conver-

Kellogg *v.* Northampton, 4 Gray (Mass.), 65 (1855); Sykes *v.* Pawlet, 43 Vt. 446 (1871); Hawes *v.* Fox Lake, 33 Wis. 438 (1873).

¹ Stinson *v.* Gardiner, 42 Me. 248 (1856); McCarthy *v.* Portland, 67 Me. 167 (1878); Blodgett *v.* Boston, 8 Allen (Mass.), 237 (1864); McDougall *v.* Salem, 110 Mass. 21 (1872).

² Gulline *v.* Lowell, 144 Mass. 491 (1887), (11 N. E. Rep. 723); Graham *v.* Boston, 156 Mass. 75 (1892), (30 N. E. Rep. 170); Reed *v.* Madison, 83 Wis. 171 (1892), (53 N. W. Rep. 547).

³ Varney *v.* Manchester, 58 N. H. 430 (1878).

⁴ Bliss *v.* South Hadley, 145 Mass. 91 (1887), (13 N. E. Rep. 352).

⁵ Britton *v.* Cummington, 107 Mass. 347 (1871).

sation,¹ or if he uses the highway solely as a playground,² or as a place for the transaction of his business,³ or as a racecourse,⁴ he cannot be considered to be a traveller.

Whether or not the injured person was at the time of the accident a traveller is a question of fact for the jury to determine upon all the evidence,⁵ unless the character of his acts at that time make it perfectly clear that he had ceased to use the highway for the proper purposes of travel, in which case it becomes the duty of the court to take the case from the jury.⁶

In those states where the common law liability prevails the tendency has been to take a much more liberal view of the question what is a proper and legitimate use of a public highway. It is recognized that, in the absence of any statute dealing with the subject, travel may not be the only use to which a highway can lawfully be put—that there may be other purposes for which a municipal corporation is bound to keep its public ways in a reasonably safe condition. In accordance with this view it has been held that persons who stop in the highway for the purpose of engaging in conversation,⁷ and even persons who are using the highway as a place in which to perform work,⁸ may still be within the protection of the

¹ *Stickney v. Salem*, 3 Allen (Mass.), 374 (1862).

² *Stinson v. Gardiner*, 42 Me. 248 (1856); *Blodgett v. Boston*, 8 Allen (Mass.), 237 (1864); *Tighe v. Lowell*, 119 Mass. 472 (1876); *Lyons v. Brookline*, 119 Mass. 491 (1876); *Strong v. Stevens Point*, 62 Wis. 255 (1885), (22 N. W. Rep. 425).

³ *McDougall v. Salem*, 110 Mass. 21 (1872).

⁴ *McCarthy v. Portland*, 67 Me. 167 (1878).

⁵ *Hunt v. Salem*, 121 Mass. 294 (1876); *Hardy v. Keene*, 52 N. H. 370 (1872); *Strong v. Stevens Point*, 62 Wis. 255, 266 (1885), (22 N. W. Rep. 425).

⁶ *Stickney v. Salem*, 3 Allen (Mass.), 374 (1862).

⁷ *Jackson v. Boone*, 93 Ga. 662 (1894), (20 S. E. Rep. 46); *Langlois v. Cohoes*, 58 Hun (N. Y.), 226 (1890), (11 N. Y. Supp. 908).

⁸ *Nesbitt v. Greenville*, 69 Miss. 22 (1891), (10 So. Rep. 452); *Reh-*

law. And further, the rule seems to be well established that the fact that a child was, at the time of the accident, playing in the street, will not of itself alone bar a recovery for the injury suffered.¹

It is ordinarily a question of fact, under the common law rule, whether the use made of the highway by the injured person was proper and legitimate.²

§ 77. When the Injured Person is, at the Time of the Accident, in the Service of the Defendant Corporation. — Just how far, if at all, a municipal corporation can avail itself of the defence of common employment when sued by a person in its service to recover compensation for injuries suffered by reason of the defective condition of a highway, appears never to have been exactly determined. It has, however, been decided on several occasions that neither members of the fire department³ nor members of the police department⁴ are co-servants of members of the street department in any such sense as to prevent them

berg *v.* Mayor, etc. of New York, 91 N. Y. 137 (1882). See also upon this subject Duffy *v.* Dubuque, 63 Ia. 171 (1884), (18 N. W. Rep. 900).

¹ *Illinois.* Chicago *v.* Keefe, 114 Ill. 222, 227 (1885), (2 N. E. Rep. 267).

Indiana. Indianapolis *v.* Emmelman, 108 Ind. 530 (1886), (9 N. E. Rep. 155).

Missouri. Donoho *v.* Vulcan Iron Works, 75 Mo. 401 (1882).

Nebraska. Omaha *v.* Richards, 49 Neb. 244 (1896), (68 N. W. Rep. 528).

New York. McGarry *v.* Loomis, 63 N. Y. 104, 108 (1875); and see also McGuire *v.* Spense, 91 N. Y. 303 (1883).

² *Jackson v. Boone*, 93 Ga. 662 (1894), (20 S. E. Rep. 46); *Nesbitt v. Greenville*, 69 Miss. 22 (1891), (10 So. Rep. 452).

³ *Turner v. Indianapolis*, 96 Ind. 51 (1884); *Coots v. Detroit*, 75 Mich. 628 (1889), (43 N. W. Rep. 17); *Palmer v. Portsmouth*, 43 N. H. 265 (1861); *Farley v. Mayor, etc. of New York*, 152 N. Y. 222 (1897), (46 N. E. Rep. 506).

⁴ *Kimball v. Boston*, 1 Allen (Mass.), 417 (1861); *Galveston v. Hemmis*, 72 Tex. 558 (1889), (11 S. W. Rep. 29).

from maintaining an action, if injured by a defect in the highway while engaged in the performance of the duties of their office, provided they are at the time in the exercise of due care.¹ And it has been held further that a surveyor of highways can recover damages in such a case, unless the defect that caused his injury was due to his own negligence.²

§ 78. When the Injured Person is, at the Time of the Accident, acting in Violation of Statute Law or City Ordinance.—The mere fact that a person injured through a defect in the highway was, at the time of his injury, acting in violation of some statute or of some municipal ordinance is not alone, as a matter of law, conclusive against his right to recover from the responsible municipal corporation compensation for the damage suffered. It is not enough in such a case, therefore, for the defendant corporation to show that such person was a violator of some law or ordinance; to fully exonerate itself from liability, it must show further that his unlawful act contributed directly to produce the injury of which he complained. The important question thus in every case of this class is, not simply whether the injured person was doing some unlawful act when injured, but whether he was at that time guilty of an offence against the law which contributed directly to his injury.³

¹ *Coots v. Detroit*, 75 Mich. 628 (1889), (43 N. W. Rep. 17); *Walker v. Vicksburg*, 71 Miss. 899 (1894), (15 So. Rep. 132); *Farley v. Mayor, etc. of New York*, 152 N. Y. 222 (1897), (46 N. E. Rep. 506).

² *Wood v. Waterville*, 4 Mass. 422 (1808); s. c. 5 Mass. 294 (1809); *Todd v. Rowley*, 8 Allen (Mass.), 51 (1864).

³ For cases involving a violation of a city ordinance as to the rate of speed, see *Cullman v. McMinn*, 109 Ala. 614 (1895), (19 So. Rep. 981); *Pueblo v. Smith*, 3 Col. App. 386, 390 (1893), (33 Pac. Rep. 685); *Baker v. Portland*, 58 Me. 199 (1870); *Hall v. Ripley*, 119 Mass. 135 (1875); *Tuttle v. Lawrence*, 119 Mass. 276 (1876). The

C. THE HIGHWAY.

§ 79. **The Place where the Accident happened must be a Highway.** — The duty of municipal corporations from which springs their liability relative to ways arises only as to such as are public highways; that is, as to such as have been duly established and opened for the public use. It is an essential element, therefore, in every action to recover damages for injuries suffered upon a travelled way, to show that such way was a public highway.¹ The burden thus imposed may be sustained by evidence along

fact that the plaintiff had no actual knowledge of the ordinance is not material in such a case. *Heland v. Lowell*, 3 Allen (Mass.), 407 (1862).

For cases discussing a violation of the law of the road, see *O'Neil v. East Windsor*, 63 Conn. 150, 155 (1893), (27 Atl. Rep. 237); *Kidder v. Dunstable*, 11 Gray (Mass.), 342 (1858); *Smith v. Gardner*, 11 Gray (Mass.), 418 (1858); *Damon v. Scituate*, 119 Mass. 66 (1875); *Smith v. Conway*, 121 Mass. 216 (1878); *Norris v. Litchfield*, 35 N. H. 271 (1857); *Gale v. Lisbon*, 52 N. H. 174 (1872).

See also *Davidson v. Portland*, 69 Me. 116 (1879), where the law violated was that relating to intoxicating liquors.

¹ See *Bishop v. Centralia*, 49 Wis. 669 (1880), (6 N. W. Rep. 353), and cases cited in the following notes.

Sidewalks are as much a part of the highway as that portion set apart for, and used by, vehicles; and are consequently as much within the duty to keep in repair. *Beardsley v. Hartford*, 50 Conn. 529, 538 (1883); *Bloomington v. Bay*, 42 Ill. 503, 506 (1867); *Frankfort v. Coleman*, 19 Ind. App. 368, 372 (1897), (49 N. E. Rep. 474); *Furnell v. St. Paul*, 20 Minn. 117, 118 (1873); *Young v. Waterville*, 39 Minn. 196 (1888), (39 N. W. Rep. 97).

"This word 'sidewalk,' as used in this country," says Mr. Justice Collins, in *Graham v. Albert Lea*, 48 Minn. 201 (1892), at page 205, (50 N. W. Rep. 1108), "does not mean a walk or way constructed of any particular kind of material, or in any special manner, but ordinarily it is used for the purpose of designating that part of the street of a municipality which has been set apart and is used for pedestrians, as distinguished from that portion set apart and used for animals and vehicles."

So bridges are also a part of the highway. *Nebraska City v. Campbell*, 2 Black (U. S.), 590 (1862).

any one of several lines; namely, by evidence tending to show that due proceedings were taken by the proper municipal authorities, in accordance with some law conferring the authority, to locate, grade, and open the way; by evidence tending to show a general and uninterrupted use of the way by the public, continued for the length of time necessary to establish a prescription; by evidence tending to show a dedication of the way to the public by the owner of the soil, and an acceptance of it by the corporation.¹ So far as the duty of the corporation is concerned, it ordinarily² makes no difference in what one of these ways the road became a highway.³

§ 80. Highways established by Dedication. — Two distinct elements are essential to the establishment of a highway by dedication: first, an appropriation of the soil by the owner to the use of the public for a highway; and, second, an acceptance of it, either express or implied, by the proper officers of the corporation, acting within the scope of their authority. As a general rule these two acts, as soon as done by the respective parties, complete

¹ *Beaudean v. Cape Girardeau*, 71 Mo. 392, 396 (1880); *Stone v. Langworthy*, 20 R. I. 602 (1898), 40 Atl. Rep. 832; *Hyde v. Jamaica*, 27 Vt. 443 (1855).

² In Michigan, under Act No. 264, § 4, Laws of 1887, the right of action is limited to cases where the injuries were suffered upon public highways which have been in use for ten years. See *McKeller v. Monitor Township*, 78 Mich. 485 (1889), (44 N. W. Rep. 412).

It is held in New Hampshire that the plaintiff must show, in order to recover, that the way where the accident happened had been legally laid out in accordance with the statutory requirements, or had been used by the public for twenty years. In the absence of such evidence, the way is not a public highway for the good condition and repair of which the corporation is responsible, or for injuries due to defects in which it can be held liable. *Haywood v. Charlestown*, 34 N. H. 23 (1856); *Smith v. Northumberland*, 36 N. H. 38 (1857); *Hardy v. Keene*, 54 N. H. 449 (1874); *Tilton v. Pittsfield*, 58 N. H. 327 (1878).

³ *Phelps v. Mankato*, 23 Minn. 276 (1877).

the dedication and establish the way as a highway: no lapse of time is necessary.¹

§ 81. **Highways established by Prescription.**—A constant and uninterrupted use and enjoyment of a way by the public, continued for the requisite number of years,² will establish a highway by prescription, on the theory that a user of such a character raises a conclusive presumption that the way was originally laid out and opened by competent authority. Nothing, therefore, except such user need be shown.³

¹ *Denver v. Clements*, 3 Col. 484 (1877); *Fisk v. Havana*, 88 Ill. 208 (1878); *Indianapolis v. Kingsbury*, 101 Ind. 200 (1884); *Kennedy v. Cumberland*, 65 Md. 514 (1886), (9 Atl. Rep. 234); *Hobbs v. Lowell*, 19 Pick. (Mass.) 405 (1837); *Hayden v. Stone*, 112 Mass. 346 (1873); *McKenna v. Boston*, 131 Mass. 143 (1881); *Wilder v. St. Paul*, 12 Minn. 192 (1866); *Gamble v. St. Louis*, 12 Mo. 617 (1849); *Whitney v. Essex*, 42 Vt. 520 (1870); *Milwaukee v. Davis*, 6 Wis. 377 (1858).

In Missouri it is held that the obligation to keep in repair as a highway the soil that has been dedicated by the owner and accepted by the corporation, does not attach until the latter, in some official and appropriate manner, has invited or sanctioned its use by the public as a highway. Such sanction may, however, be given by the acts of its proper officers as well as by acts in the form of ordinances. "To the extent to which the city has sanctioned the use of such land by the public as a thoroughfare may the city justly be held liable for ordinary care to maintain the thoroughfare in reasonable repair for such use." *Baldwin v. Springfield*, 141 Mo. 205 (1897), (42 S. W. Rep. 717); *Taubman v. Lexington*, 25 Mo. App. 218 (1887).

² The rule is not uniform in the different states as to what is a sufficient period of user to establish a highway by prescription. It may be said, however, that as a general rule the use of a way for twenty years or more is sufficient for that purpose in most states. *Jennings v. Tisbury*, 5 Gray (Mass.), 73 (1855); and see cases cited in the following note.

³ *Todd v. Rome*, 2 Me. 55 (1822); *Kennedy v. Cumberland*, 65 Md. 514, 521 (1886), (9 Atl. Rep. 234), *semble*; *Aston v. Newton*, 134 Mass. 507 (1883); *Veale v. Boston*, 135 Mass. 187 (1883); *Beandean v. Cape Girardeau*, 71 Mo. 392, 396 (1880); *Willey v. Portsmouth*, 35 N. H. 303, 311 (1857); *Smith v. Northumberland*, 36 N. H. 38 (1857);

§ 82. Highways established in Due Form of Law. — When the legal establishment of a highway by proceedings taken in accordance with charter or statutory provision is directly in issue, it is necessary to show that all the requirements of such provision were exactly followed. The rule, however, is not so strict when the existence of a highway is only collaterally in issue, as is the case in an action to recover damages for an injury suffered by reason of the defective condition of such highway. It is commonly held in all such actions that the injured person cannot be thrown upon an inquiry into the regularity of the proceedings by which the way was originally established. It is generally sufficient for him to show that the place where the accident happened had been treated by the defendant corporation as a highway, and that travel upon it had been expressly or impliedly invited by the corporate authorities.¹ And the fact that repairs had been made by the corporation at the place of the accident

Speir v. New Utrecht, 121 N. Y. 420 (1890), (24 N. E. Rep. 692); *Lemon v. Hayden*, 13 Wis. 159 (1860); *Hart v. Red Cedar*, 63 Wis. 634, 638 (1885), (24 N. W. Rep. 410).

¹ *Illinois.* *Champaign v. Patterson*, 50 Ill. 61 (1869); *Mansfield v. Moore*, 124 Ill. 133 (1888), (16 N. E. Rep. 246); *Marseilles v. Howland*, 124 Ill. 547 (1888), (16 N. E. Rep. 883).

Indiana. *Aurora v. Colshire*, 55 Ind. 484 (1876); *Goshen v. Myers*, 119 Ind. 196 (1889), (21 N. E. Rep. 657).

Kentucky. *Henderson v. Sandefur*, 11 Bush, 550 (1875), *semble*.

Maine. *Bradbury v. Benton*, 69 Me. 194, 198 (1879).

Michigan. *Will v. Mendon*, 108 Mich. 251, 253 (1896), (66 N. W. Rep. 58).

Minnesota. *Lindholm v. St. Paul*, 19 Minn. 245 (1872); *Treise v. St. Paul*, 36 Minn. 526 (1887), (32 N. W. Rep. 857); *Graham v. Albert Lea*, 48 Minn. 201 (1892), (50 N. W. Rep. 1108).

Missouri. *Maus v. Springfield*, 101 Mo. 613, 617 (1890), (14 S. W. Rep. 630).

New York. *Sewell v. Cohoes*, 75 N. Y. 45 (1878); *Pomfrey v. Saratoga Springs*, 104 N. Y. 459, 466 (1887), (11 N. E. Rep. 43);

is also strong evidence in support of the issue.¹ This rule rests upon the principle that when the character of a particular place as a highway is only collaterally in issue, it is sufficiently established by any proof tending to show that it was used by the public as a highway with

McVee v. Watertown, 92 Hun (N. Y.), 306 (1895), (36 N. Y. Supp. 870).

Pennsylvania. *Aston v. McClure*, 102 Pa. St. 322 (1883).

Texas. *Austin v. Ritz*, 72 Tex. 391, 403 (1888). (9 S. W. Rep. 884).

Washington. *Taake v. Seattle*, 18 Wash. 178 (1897), (51 Pac. Rep. 362).

West Virginia. *Wilson v. Wheeling*, 19 W. Va. 323, 349 (1882); *Phillips v. Huntington*, 35 W. Va. 406 (1891), (14 S. E. Rep. 17).

Wisconsin. *Codner v. Bradford*, 3 Chand. 291 (1851); *Houfe v. Fulton*, 34 Wis. 608 (1874).

United States. *Mayor, etc. of New York v. Sheffield*, 4 Wall. 189, 193 (1866).

In *Cartright v. Belmont*, 58 Wis. 370 (1883), (17 N. W. Rep. 237), it was held that the defendant corporation, by long acquiescence in the use of a side track by the public as a part of the travelled highway, might become bound to keep the same in repair. Here the use was continued for about three years.

¹ *Anna v. Boren*, 77 Ill. App. 408, 410 (1898); *Treise v. St. Paul*, 36 Minn. 526 (1887), (32 N. W. Rep. 857); *Whitney v. Essex*, 42 Vt. 520 (1870); *Coates v. Canaan*, 51 Vt. 131 (1878); *Codner v. Bradford*, 3 Chand. (Wis.) 291 (1851).

In Maine and Massachusetts, by virtue of statute provision (Mass. Pub. Sts. c. 52, § 25; Me. Rev. Sts. (1883) c. 18, § 81), repairs made by a town upon a way within six years before an accident are conclusive as to its location. *Gilpatrick v. Biddeford*, 51 Me. 182 (1863); *Hayden v. Attleborough*, 7 Gray (Mass.), 338 (1856); *Taylor v. Woburn*, 130 Mass. 494, 500 (1881). The actual making of repairs must be shown, however, in order to have this effect; a vote of the town to make repairs, so long as unexecuted, is not enough. *Brown v. Lawrence*, 120 Mass. 1 (1876). And the town may show that the way where the injury occurred was not the same one on which the repairs were made. *Gilpatrick v. Biddeford*, 51 Me. 182 (1863). The making of repairs, under these statutes, is conclusive only upon the question of the location of the way, and not necessarily upon the question of the responsibility of the town for its defects. *Wilson v. Boston*, 117 Mass. 509 (1875).

the knowledge and assent of the corporation to shift the burden of going forward with the evidence upon the defendant; it may, of course, if it can, disprove the *prima facie* case made by such proof.¹

It follows as a corollary from the above rule that a municipal corporation cannot set up in defence of the action, when sued for an injury due to its failure to properly maintain a particular way, any illegality in the proceedings incident to its establishment.² A contrary view, however, prevails in New Hampshire,³ and also, it seems, in Massachusetts.⁴

§ 83. The opening of the Highway to Public Use — When the Liability begins. — No precise rule can be laid down fixing the exact stage in the proceedings to establish a highway at which it will be considered so far open to the public that liability for its defective condition will attach. Necessarily each case as it arises must be determined largely upon its own particular facts. It has been decided, however, that the mere fact of determining the necessity for, and the location of, a particular highway by judicial action, does not of itself so far open it to the public as to render the municipal corporation responsible for accidents that may occur to persons travelling thereon.⁵ For, of course, after such action is taken, the way is still to be prepared for public use. "Labor is to be performed upon it. Bridges are to be built, hills cut down, and valleys filled up; obstructions are to be removed and

¹ See *Logan County v. People*, 6 N. E. Rep. 475, 479 (Ill., 1886).

² *Pekin v. Newell*, 26 Ill. 320 (1861); *Mayor, etc. of New York v. Sheffield*, 4 Wall. (U. S.) 189 (1866).

³ *Hall v. Manchester*, 39 N. H. 295 (1859); *Tilton v. Pittsfield*, 58 N. H. 327 (1878); *Horns v. Rochester*, 62 N. H. 347 (1882); *Wentworth v. Rochester*, 63 N. H. 244 (1884); *Randall v. Conway*, 63 N. H. 513 (1885), (3 Atl. Rep. 635); *Norris v. Haverhill*, 65 N. H. 89 (1888), (18 Atl. Rep. 85).

⁴ *Jones v. Andover*, 9 Pick. (Mass.) 146 (1829).

⁵ *Blaisdell v. Portland*, 39 Me. 113 (1875).

rough places made smooth." On the other hand it is generally conceded that no formal opening of the highway to public use is necessary in order to impose upon the corporation the duty of keeping it in a reasonably safe condition. If it permits the public to treat and use as a public highway land that has been laid out and partially improved for a highway, though not formally opened as such, it will be liable for injuries due to its unsafe condition.¹

§ 84. The Liability as to Portions of a Highway constructed by Private Persons. — It is not essential to the liability of a municipal corporation that it should appear that the portion of the highway where the accident happened was constructed by it through its proper officers. It will still be liable even though such portion was built by a private individual without authority to so do, provided it has, in some appropriate manner, accepted the portion so built as a part of its highway.² It is to be

¹ *Blaisdell v. Portland*, 39 Me. 113 (1855); *Drury v. Worcester*, 21 Pick. (Mass.) 44 (1838); *Brennan v. St. Louis*, 92 Mo. 482 (1887), (2 S. W. Rep. 481); *Taubman v. Lexington*, 25 Mo. App. 218 (1887); *Meiners v. St. Louis*, 130 Mo. 274 (1895), (32 S. W. Rep. 637); *Downend v. Kansas City*, 71 Mo. App. 529 (1897); *Imperial v. Wright*, 34 Neb. 732 (1892), (52 N. W. Rep. 374); *Seymour v. Salamanca*, 187 N. Y. 364 (1893), (38 N. E. Rep. 304); *Schafer v. Mayor, etc. of New York*, 154 N. Y. 466 (1897), (48 N. E. Rep. 749).

In *Lowell v. Moscow*, 12 Me. 300 (1835), it appeared that one year was allowed the defendant town in which to construct and open a new highway; that such time had not expired when the accident in question happened; that the way had not then been completed, though it was being used, but the work of construction was still in progress. The court held that the defendant was not liable.

² *Illinois*. *Champaign v. McInnis*, 26 Ill. App. 338 (1887); *Flora v. Naney*, 136 Ill. 45 (1891), (26 N. E. Rep. 645); *Hogan v. Chicago*, 168 Ill. 551, 559 (1897), (48 N. E. Rep. 210).

Indiana. *Goshen v. Myers*, 119 Ind. 196 (1889), (21 N. E. Rep. 657).

Iowa. *Barnes v. Newton*, 46 Ia. 567 (1877); *Shannon v. Tama City*, 74 Ia. 22 (1887), (36 N. W. Rep. 776).

Michigan. *Fuller v. Jackson*, 82 Mich. 480 (1890), (46 N. W. Rep.

observed that the mere act of such private individual in constructing the part of the highway does not impose the liability upon the corporation. That arises only when it, by its own acts, either by permitting the public to use such part of the highway for a sufficient length of time or by some other appropriate act, must be deemed to have adopted it as a part of its highway. It is thus a question of fact to be determined under the circumstances of each particular case, whether the defendant corporation has become responsible for such portion of the highway.¹

721); *Lombar v. East Tawas*, 86 Mich. 14, 23 (1891), (48 N. W. Rep. 947).

Minnesota. *Furnell v. St. Paul*, 20 Minn. 117, 120 (1873); *Graham v. Albert Lea*, 48 Minn. 201 (1892), (50 N. W. Rep. 1108).

Missouri. *Oliver v. Kansas City*, 69 Mo. 79 (1878).

Nebraska. *Plattsmouth v. Mitchell*, 20 Neb. 228 (1886), (29 N. W. Rep. 593); *Ponca v. Crawford*, 23 Neb. 662, 666 (1888), (37 N. W. Rep. 609); *Foxworthy v. Hastings*, 25 Neb. 133 (1888), (41 N. W. Rep. 132); *Kinney v. Tekamah*, 30 Neb. 605 (1890), (46 N. W. Rep. 835); *Chadron v. Glover*, 43 Neb. 782 (1895), (62 N. W. Rep. 62).

New Hampshire. *Willey v. Portsmouth*, 35 N. H. 303, 313 (1857); *Lambert v. Pembroke*, 66 N. H. 280 (1890), (23 Atl. Rep. 81).

New York. *Hiller v. Sharon Springs*, 28 Hun (N. Y.), 344 (1882).

Pennsylvania. *Dalton v. Upper Tyrone Township*, 137 Pa. St. 18 (1890), (20 Atl. Rep. 637).

Texas. *Klein v. Dallas*, 71 Tex. 280, 284 (1888), (8 S. W. Rep. 90).

Vermont. *Potter v. Castleton*, 53 Vt. 435, 440 (1881).

¹ See *Hiller v. Sharon Springs*, 28 Hun (N. Y.), 344 (1882).

Where it appeared that a portion of a highway had become impassable, and that one of the selectmen of the defendant town had placed a barrier across it for the purpose of turning, for the time being, travel from it on to and over a private way, which had never been adopted by the defendant as one of its highways, the court held that these facts constituted a temporary adoption of the private way as a substitute for the highway while the latter was not in a fit condition for use, and that the defendant town thereby became liable for injuries to a traveller occasioned by reason of the insufficiency and want of repair of the private way. *Dickinson v. Rockingham*, 45 Vt. 99 (1872).

§ 85. **The Liability not affected by the Ownership of the Fee in the Land.** — The simple fact that a municipal corporation does not own the fee in the soil over which it has constructed a highway does not affect its liability for accidents happening upon it by reason of its defective condition. That it assumed to, and did, exercise the right to use the land as a highway, though owned by third persons, and to control it by making improvements, is generally enough to fasten upon it the obligation to exercise the same degree of care concerning it as if it had owned the land itself and had lawfully set it apart as a highway.¹

§ 86. **The Width of the Highway.** — Municipal corporations are not necessarily bound to prepare and maintain in a reasonably safe condition for travel the full located width of a highway. And this is peculiarly true as to towns in sparsely settled districts, where travel is comparatively light. They fulfil their entire duty in this regard when they have wrought and kept in a condition fit for ordinary use a highway of sufficient width to reasonably accommodate the travel at the particular place and time.² If they have done this much, they will not

¹ *Mansfield v. Moore*, 124 Ill. 133 (1888), (16 N. E. Rep. 246); *Roodhouse v. Christian*, 55 Ill. App. 107 (1893); *Sewell v. Cohoes*, 75 N. Y. 45 (1878).

² *Wellington v. Gregson*, 31 Kan. 99 (1883), (1 Pac. Rep. 253); *Morse v. Belfast*, 77 Me. 44, 45 (1885); *Bassett v. St. Joseph*, 53 Mo. 290, 303 (1873); *Tritz v. City of Kansas*, 84 Mo. 632, 642 (1884); *Prideaux v. Mineral Point*, 43 Wis. 518, 523 (1878). And see also *Austin v. Ritz*, 72 Tex. 391, 400 (1888), (9 S. W. Rep. 884).

A person who is familiar with a public driveway which is reasonably safe for vehicles of ordinary width, assumes the risk necessarily involved in the act if he attempts to drive over it a truck of extreme width. *Jordan v. Mayor, etc. of New York*, 44 N. Y. App. Div. 149 (1899), (60 N. Y. Supp. 696).

In *Smith v. Wakefield*, 105 Mass. 473 (1870), it was held that the defendant town was not liable for injuries caused by the narrowness

ordinarily be responsible for injuries sustained by one who was, at the time of the accident, travelling upon some other part of such highway.¹

But if a corporation has voluntarily gone on and improved and left open for travel a highway for its entire located width, it will be bound to keep the whole in a reasonably safe condition for travel, and will consequently be responsible for injuries sustained by reason of a defect in any part of its width.²

§ 87. The discontinuing of the Highway — When the Liability ceases. — In order to completely end its responsibility for the safe condition of any particular highway or portion of a highway, a municipal corporation must take such steps as shall bring about a real and actual discontinuance of it as to all persons both by day and during the night-time. In the absence of anything to the contrary, travellers have a right to assume that a highway which appears to be open and to be used by the public has not been discontinued. Hence the mere vote of the corporation cannot alone serve to so discontinue it as to put an end to its liability, save perhaps as to persons who may have actual notice of such acts. Something more on its part is necessary. Some effectual warning of the

and crookedness of a highway, said defects being due to the manner in which it was laid out by the county commissioners, on the ground that the town had not the right to go outside of the limits defined by the location in order to make the highway more safe for travel. There could be no liability for a defect which it had neither the power nor the right to remedy.

¹ See § 90, *post*, and cases there cited.

² *Crystal v. Des Moines*, 65 Ia. 502 (1885), (22 N. W. Rep. 646); *Saylor v. Montesano*, 11 Wash. 328, 333 (1895), (39 Pac. Rep. 653).

When a municipality opens a street in whole or in part, it is bound to keep it, or such part of it, in its entirety, reasonably safe for public travel. *Kossman v. St. Louis*, 153 Mo. 293 (1899), (54 S. W. Rep. 513).

danger must be given by it to the public. The corporation must, in short, if it would end its liability, by the erection of barriers or by some other equally effective means, so withdraw the highway from use as to leave no doubt of its intention to wholly exclude the public therefrom. Until it has employed such precautions and guards as shall be sufficient to effectually warn travellers in the exercise of ordinary care and prudence that such highway has been closed to public travel, its liability as to all persons without notice remains unchanged.¹

The question whether or not the means employed by it were sufficient to bring about an actual discontinuance of the highway is a question of fact for the jury to determine in each particular case.² The decision of the question may involve the consideration of several matters, such as the situation of the highway; the modes commonly adopted for closing highways; the traveller's knowledge of such modes; and similar facts.³

¹ *Munson v. Derby*, 37 Conn. 298 (1870); *White v. Boston*, 122 Mass. 491 (1877); *Southwell v. Detroit*, 74 Mich. 438 (1889), (42 N. W. Rep. 118); *Stephens v. Macon*, 83 Mo. 345, 352 (1884); *Bills v. Kaukauna*, 94 Wis. 310 (1896), (68 N. W. Rep. 992).

Where the defendant corporation put up a barbed-wire fence across the highway in order to discontinue its use, the court says that a barrier of such a character, in the night-time, was not only an utter failure, but exposed travellers to great and positive danger of injury to person and property. *Bills v. Kaukauna*, 94 Wis. 310 (1896), (68 N. W. Rep. 992).

In New York, by statute, if a highway remains for six years impassable for conveyances, by being fenced off or by excavations made therein, its legal character as a highway is destroyed, and liability in respect to it ceases. See *Horey v. Haverstraw*, 124 N. Y. 273 (1891), (26 N. E. Rep. 532).

² *Howard v. Mendon*, 117 Mass. 585 (1875); *Norwood v. Somerville*, 159 Mass. 105 (1893), (33 N. E. Rep. 1108); *Stephens v. Macon*, 83 Mo. 345, 352 (1884).

³ See *White v. Boston*, 122 Mass. 491 (1877).

D. THE DEFECT.

§ 88. What constitutes a Defect. — The duty resting upon municipal corporations relative to highways, it is to be remembered, is to keep them in a reasonably safe condition for travel in the ordinary modes both by day and in the night-time. This being the duty, then, in general terms, whatever in the condition of a highway, the existence of which is due to negligence on the part of the corporation,¹ renders it unsafe for ordinary travel constitutes a defect which may be made the basis of a civil action by any person injured thereby. The condition of a highway that renders travel in the ordinary modes unsafe may consist of an obstruction in an otherwise safe road, such as a pile of dirt,² brick,³ or stones⁴ left in the way, or a stump⁵ standing in or near to the travelled path, or a post or barrier⁶ set up in the way, or

¹ *Aurora v. Pulfer*, 56 Ill. 270, 276 (1870); *Craig v. Sedalia*, 63 Mo. 417, 419 (1876); *Hunt v. Mayor*, etc. of New York, 109 N. Y. 134 (1883), (16 N. E. Rep. 320).

² *Stafford v. Oskaloosa*, 57 Ia. 748 (1882), (11 N. W. Rep. 668); *Griffin v. Mayor*, etc. of New York, 9 N. Y. 456 (1853).

³ *Hazard v. Council Bluffs*, 87 Ia. 51 (1893), (53 N. W. Rep. 1083); *Frost v. Portland*, 11 Me. 271 (1834).

⁴ *Bigelow v. Weston*, 3 Pick. (Mass.) 267 (1825); *Naylor v. Salt Lake City*, 9 Utah, 491 (1894), (35 Pac. Rep. 509).

⁵ *Newport v. Miller*, 93 Ky. 22 (1892), (18 S. W. Rep. 835); *Tilton v. Wenham*, 172 Mass. 407 (1899), (52 N. E. Rep. 514); *Ward v. Jefferson*, 24 Wis. 342 (1869); *Boltz v. Sullivan*, 101 Wis. 608 (1899), (77 N. W. Rep. 870); *Mayor, etc. of New York v. Sheffield*, 4 Wall. (U. S.) 189 (1866).

⁶ *Pleasant Grove Township v. Ware*, 7 Kan. App. 648 (1898), (53 Pac. Rep. 885); *Snow v. Adams*, 1 Cush. (Mass.) 443, 446 (1848); *Arey v. Newton*, 148 Mass. 598 (1889), (20 N. E. Rep. 327); *Phelps v. Mankato*, 23 Minn. 276 (1877); *Yeaw v. Williams*, 15 R. I. 20 (1885), (23 Atl. Rep. 33). See also *Wellington v. Gregson*, 31 Kan. 99 (1883), (1 Pac. Rep. 253); *Taylor v. Woburn*, 130 Mass. 494 (1881).

But a hitching-post, properly located, cannot be considered an un-

logs or lumber¹ extending into the travelled path; or it may consist of an unfitness of the roadbed itself, due to faulty construction,² or to ordinary wear,³ or to any other cause.

But in order to constitute a defect, the condition complained of need not, it has been held, present such a state of things as to endanger all modes of public travel upon the highway; it is enough that it makes any mode dangerous which the public have a right to use. Under this rule a post set in the highway so near to the street-railway tracks as to knock the conductor of a passing car from the running-board while he was collecting fares, was held to be a defect, although it might not render dangerous any other mode of travel.⁴

Whether or not a highway is defective, or is reasonably lawful obstruction. *Weinstein v. Terre Haute*, 147 Ind. 556 (1897), (46 N. E. Rep. 1004); *Macomber v. Taunton*, 100 Mass. 255 (1868).

¹ *O'Neil v. East Windsor*, 63 Conn. 150 (1893), (27 Atl. Rep. 237); *Johnson v. Whitefield*, 18 Me. 286 (1841); *Langworthy v. Green Township*, 88 Mich. 207 (1891), (50 N. W. Rep. 130); *Bagley v. Ludlow*, 41 Vt. 425 (1868); *Saylor v. Montesano*, 11 Wash. 328 (1895), (39 Pac. Rep. 653); *Slivitski v. Wien*, 93 Wis. 460 (1896), (67 N. W. Rep. 730).

A water-plug placed in the highway by a water company which projected several inches above the surface has been held to be a defect. *Scranton v. Catterson*, 91 Pa. St. 202 (1880). And so rails laid in the highway by a street-railway company. *Michigan City v. Boeckling*, 122 Ind. 39 (1889), (23 N. E. Rep. 518).

In Michigan it has been held that the statutory liability was confined to such defects in the highway as arose from its being out of repair, and did not cover objects forming no part of it and not affecting its condition as a way properly kept in repair. *Agnew v. Corunna*, 55 Mich. 428 (1885), (21 N. W. Rep. 873); *McArthur v. Saginaw*, 58 Mich. 357 (1885), (25 N. W. Rep. 313). See *Whitney v. Ticonderoga*, 127 N. Y. 40 (1891), (27 N. E. Rep. 403), which is *contra*.

² *Glantz v. South Bend*, 106 Ind. 305 (1885), (6 N. E. Rep. 632).

³ *Kansas City v. Bradbury*, 45 Kan. 381 (1891), (25 Pac. Rep. 889); *Cromarty v. Boston*, 127 Mass. 329 (1879).

⁴ *Powers v. Boston*, 154 Mass. 60 (1891), (27 N. E. Rep. 995).

safe for travel by the ordinary modes, is usually a question of fact for the jury;¹ but if the precise position and the characteristics of the alleged defect are not matters of controversy, the court can determine the question as a matter of law.²

1 Connecticut. Congdon *v.* Norwich, 37 Conn. 414, 418 (1870); Lee *v.* Barkhamsted, 46 Conn. 213 (1878); O'Neil *v.* East Windsor, 63 Conn. 150 (1893), (27 Atl. Rep. 237).

Illinois. Grayville *v.* Whitaker, 85 Ill. 439 (1877).

Indiana. Michigan City *v.* Boeckling, 122 Ind. 39 (1889), (23 N. E. Rep. 518).

Kansas. Wellington *v.* Gregson, 31 Kan. 99 (1883), (1 Pac. Rep. 253).

Kentucky. Newport *v.* Miller, 93 Ky. 22 (1892), (18 S. W. Rep. 835).

Maine. Merrill *v.* Hampden, 26 Me. 234 (1846); Bryant *v.* Biddeford, 39 Me. 193 (1855); Morse *v.* Belfast, 77 Me. 44 (1885).

Massachusetts. Ghenn *v.* Provincetown, 105 Mass. 313 (1870); Dowd *v.* Chicopee, 116 Mass. 93 (1874); Pratt *v.* Amherst, 140 Mass. 167 (1885), (2 N. E. Rep. 772); Harris *v.* Great Barrington, 169 Mass. 271, 275 (1897), (47 N. E. Rep. 881).

Michigan. Malloy *v.* Walker Township, 77 Mich. 448 (1889), (43 N. W. Rep. 1012).

Missouri. Craig *v.* Sedalia, 63 Mo. 417 (1876).

New Hampshire. Johnson *v.* Haverhill, 35 N. H. 74, 85 (1857); Hardy *v.* Keene, 52 N. H. 370 (1872); Downes *v.* Hopkinton, 67 N. H. 456 (1893), (40 Atl. Rep. 433).

Rhode Island. Yeaw *v.* Williams, 15 R. I. 20 (1885), (28 Atl. Rep. 33).

Vermont. Leicester *v.* Pittsford, 6 Vt. 245 (1834); Cassedy *v.* Stockbridge, 21 Vt. 391 (1849); Willard *v.* Newbury, 22 Vt. 458 (1850); Bagley *v.* Ludlow, 41 Vt. 425 (1868).

Washington. Saylor *v.* Montesano, 11 Wash. 328, 334 (1895), (39 Pac. Rep. 653).

Wisconsin. Wheeler *v.* Westport, 30 Wis. 392 (1872); Hein *v.* Fairchild, 87 Wis. 258, 263 (1894), (58 N. W. Rep. 413); Vass *v.* Waukesha, 90 Wis. 337 (1895), (63 N. W. Rep. 280).

² Raymond *v.* Lowell, 6 Cush. (Mass.) 524 (1850); Macomber *v.* Taunton, 100 Mass. 255 (1868); Beltz *v.* Yonkers, 148 N. Y. 67, 70 (1895), (42 N. E. Rep. 401).

As to when the court will set aside the verdict of the jury upon this point, see Weeks *v.* Parsonsfield, 65 Me. 285 (1876).

The fact that in the opinion of those municipal authorities who are charged with the duty of caring for the highways, the condition of things by reason of which the traveller was injured did not constitute a defect is not at all material. The inquiry in every case is not as to the belief of the municipal authorities, but as to the actual fact, which, as noted above, it is for the jury to find from all the circumstances of the case.¹

§ 89. The Cause of the Defect. — The essence of the liability of municipal corporations as to highways is for not abating an unsafe condition that may exist therein. Therefore, what was the cause of that unsafe condition is of itself a matter of very little consequence. Indeed, it may be created by the corporation itself,² or by third persons,³

¹ *Hinckley v. Somerset*, 145 Mass. 326, 336 (1887), (14 N. E. Rep. 166); *Hover v. Barkhoof*, 44 N. Y. 113, 117 (1870); *Rehberg v. Mayor, etc. of New York*, 91 N. Y. 137, 144 (1883); *Goodfellow v. Same*, 100 N. Y. 15 (1885), (2 N. E. Rep. 462).

² *Hogan v. Chicago*, 168 Ill. 551, 559 (1897), (48 N. E. Rep. 210); *Glantz v. South Bend*, 106 Ind. 305 (1885), (6 N. E. Rep. 632); *Pratt v. Amherst*, 140 Mass. 167 (1885), (2 N. E. Rep. 772); *Pettengill v. Yonkers*, 116 N. Y. 558 (1889), (22 N. E. Rep. 1095); *Nashville v. Brown*, 9 Heisk. (Tenn.) 1 (1871); *Wilson v. Wheeling*, 19 W. Va. 323, 334 (1882).

³ *Indiana*. *Fort Wayne v. De Witt*, 47 Ind. 391 (1874); *Huntington v. Breen*, 77 Ind. 29 (1881); *Michigan City v. Boeckling*, 122 Ind. 39 (1889), (23 N. E. Rep. 518).

Iowa. *Case v. Waverly*, 36 Ia. 545 (1873).

Kansas. *Jansen v. Atchison*, 16 Kan. 358 (1876).

Maryland. *Baltimore v. Pendleton*, 15 Md. 12 (1859).

Massachusetts. *Snow v. Adams*, 1 Cush. (Mass.) 443 (1848).

Missouri. *Haniford v. Kansas City*, 103 Mo. 172, 181 (1890), (15 S. W. Rep. 753); overruling *Barry v. St. Louis*, 17 Mo. 121 (1852).

Nebraska. *Davis v. Omaha*, 47 Neb. 836 (1896), (66 N. W. Rep. 859).

New York. *Requa v. Rochester*, 45 N. Y. 129 (1871); *Weed v. Ballston Spa*, 76 N. Y. 329 (1879); *Cohen v. Mayor, etc. of New York*, 113 N. Y. 532 (1889), (21 N. E. Rep. 700).

Pennsylvania. *Scranton v. Catterson*, 94 Pa. St. 202 (1880);

or by the action of the elements,¹ or by any other conceivable cause, and in each case the corporation will be liable to any person injured by reason of its existence, provided it knew, or by the exercise of reasonable care and diligence might have known, of it in time to have remedied it before the accident happened.

Under this rule, the fact alone that a municipal corporation had no control over the cause that produced the defect, and could not prevent its operation, can afford no defence;² if it might have discovered and remedied the defect by the exercise of proper diligence, it is still liable. If, however, it appears that the defective condition was one that the corporation had neither the power nor the right to remedy, it is not liable: the liability is only co-extensive with the right and duty to repair.³ Thus, it has been held that the narrowness and crookedness of a

Mills v. Philadelphia, 187 Pa. St. 287 (1898), (40 Atl. Rep. 821).

Virginia. McCoull v. Manchester, 85 Va. 579 (1888), (8 S. E. Rep. 379).

United States. District of Columbia v. Woodbury, 136 U. S. 450, 464 (1890), (10 S. Ct. Rep. 990).

¹ *Kansas City v. Bradbury*, 45 Kan. 381 (1891), (25 Pac. Rep. 889); *Palmer v. Portsmouth*, 43 N. H. 265 (1861).

In *Hopkins v. Rush River*, 70 Wis. 10 (1887), (34 N. W. Rep. 909; 35 N. W. Rep. 939), it was held that if the action of the elements by which the defect was caused was unusual and extraordinary, the defendant was not liable, on the ground that it was bound to provide only against the usual and ordinary action of the elements. The test there laid down was whether the action in a particular case is unusual and extraordinary, not whether it might reasonably have been expected to occur. See also *Village v. Kallagher*, 52 Oh. St. 183 (1894), (39 N. E. Rep. 144); and *Brendlinger v. New Hanover Township*, 148 Pa. St. 93 (1892), (23 Atl. Rep. 1105).

² See *Billings v. Worcester*, 102 Mass. 329, 332 (1869).

³ *Jones v. Waltham*, 4 Cush. (Mass.) 299 (1849); *Smith v. Wakefield*, 105 Mass. 473 (1870). And see *Flanders v. Norwood*, 141 Mass. 17 (1886), (5 N. E. Rep. 256).

highway, due to the manner in which it was laid out by the county commissioners, though they may constitute defects, will not render the corporation liable to a person injured in consequence thereof, since it had no right to go outside of the limits defined by the location in order to make the highway more safe.¹

§ 90. **The Defect must be in the Travelled² Part.** — The duty to maintain highways in a reasonably safe condition does not necessarily require that municipal corporations should prepare for travel the whole road from one boundary to the other.³ A wrought part that is reasonably safe for ordinary travel satisfies the requirements of the law. It follows, therefore, that municipal corporations are liable primarily only for injuries sustained by reason of defects that exist in that part of the highway which is wrought for public travel. Hence if a traveller, without any necessity for such action, or for his own pleasure or convenience, deviates from the wrought track, he does so at his own peril, and cannot hold the corporation responsible for damages sustained by defects outside the travelled part.⁴ And in the application of this rule it makes no difference whether such defects were within or without

¹ *Smith v. Wakefield*, 105 Mass. 473 (1870).

² By the "travelled part" of the road is intended that part which is usually wrought for travel, and not any track which may happen to be made in the road by the passing of vehicles. *Clark v. Commonwealth*, 4 Pick. (Mass.) 125 (1826); *Wakeham v. St. Clair Township*, 91 Mich. 15, 28 (1892), (51 N. W. Rep. 696).

³ As to the width of the highway, see § 86, *ante*.

⁴ *Kansas. Wellington v. Gregson*, 31 Kan. 99 (1883), (1 Pac. Rep. 253).

Maine. *Philbrick v. Pittston*, 63 Me. 477 (1874); *Perkins v. Fayette*, 68 Me. 152 (1878); *Blake v. Newfield*, 68 Me. 365 (1878); *Brown v. Skowhegan*, 82 Me. 273 (1890), (19 Atl. Rep. 399); *Tasker v. Farmingdale*, 85 Me. 523 (1893), (27 Atl. Rep. 464).

Massachusetts. *Howard v. North Bridgewater*, 16 Pick. (Mass.)

the limits of the highway as located, provided they were outside the travelled part.¹

189 (1834); *Smith v. Wendell*, 7 *Cush.* 498 (1851); *Carey v. Hubbardston*, 172 *Mass.* 106 (1898), (51 *N. E. Rep.* 521).

Michigan. *Keyes v. Marcellus*, 50 *Mich.* 439 (1883), (15 *N. W. Rep.* 542).

New Hampshire. *Willey v. Portsmouth*, 35 *N. H.* 303, 312 (1857).

New York. *Dougherty v. Horseheads*, 159 *N. Y.* 154 (1899), (53 *N. E. Rep.* 799).

Pennsylvania. *Seranton v. Hill*, 102 *Pa. St.* 378 (1883); *Monongahela City v. Fischer*, 111 *Pa. St.* 9 (1885), (2 *Atl. Rep.* 87).

Texas. *Austin v. Ritz*, 72 *Tex.* 391, 400 (1888), (9 *S. W. Rep.* 884).

Vermont. *Rice v. Montpelier*, 19 *Vt.* 470 (1847); *Sykes v. Pawlet*, 43 *Vt.* 446 (1871); *Ozier v. Hinesburgh*, 44 *Vt.* 220 (1872).

Wisconsin. *Kelley v. Fond du Lac*, 31 *Wis.* 179 (1872); *Hawes v. Fox Lake*, 33 *Wis.* 438, 442 (1873); *Matthews v. Baraboo*, 39 *Wis.* 674, 677 (1876); *Goeltz v. Ashland*, 75 *Wis.* 642 (1890), (44 *N. W. Rep.* 770); *Rhyner v. Menasha*, 97 *Wis.* 523 (1897), (73 *N. W. Rep.* 41).

In *Johnson v. Whitefield*, 18 *Me.* 286 (1841), it was held that citizens had a right to travel over the whole width of the highway as laid out, without being subjected to any other or greater danger than might be presented by natural obstacles or those occasioned by making and repairing the travelled part. And hence that a traveller, injured while outside the prepared part by running against a log unnecessarily placed there by a third person, might recover damages of the town.

¹ *Blake v. Newfield*, 68 *Me.* 365 (1878), and cases cited above. See also the following cases, in which the injury was occasioned by a defect outside the limits of the highway:—

District of Columbia. *Young v. District of Columbia*, 3 *MacArthur*, 137 (1879).

Georgia. *Zettler v. Atlanta*, 66 *Ga.* 195 (1880).

Iowa. *O'Langlin v. Dubuque*, 42 *Ia.* 539 (1876).

Maine. *Morgan v. Hallowell*, 57 *Me.* 375 (1869); *Willey v. Elsworth*, 64 *Me.* 57 (1874).

Massachusetts. *Stockwell v. Fitchburg*, 110 *Mass.* 305 (1872).

New Hampshire. *Knowlton v. Pittsfield*, 62 *N. H.* 535 (1883).

Ohio. *Kelley v. Columbus*, 41 *Oh. St.* 263 (1884).

Pennsylvania. *Worriow v. Upper Chichester Township*, 149 *Pa. St.* 40 (1892), (24 *Atl. Rep.* 85).

Virginia. *Clark v. Richmond*, 83 *Va.* 355 (1887), (5 *S. E. Rep.* 369.)

West Virginia. *Biggs v. Huntington*, 32 *W. Va.* 55 (1889), (9 *S. E. Rep.* 51).

Wisconsin. *Bogie v. Waupun*, 75 *Wis.* 1 (1889), (43 *N. W. Rep.* 667); *Stricker v. Reedsburgh*, 101 *Wis.* 457 (1899), (77 *N. W. Rep.* 897).

This general rule of law is, however, subject to several exceptions. Thus, although injured by a defect outside the prepared part, the traveller may still be entitled to recover compensation if he can show that the defect was so near to the travelled part as to render its use unsafe.¹ In cases of this class it is usually a question of fact for the jury whether the dangerous spot was in such close proximity to the prepared part as to make travel thereon unsafe.²

So also a traveller may leave the travelled part of the highway and still retain the right to maintain an action against the corporation if an accident happens to him while he is outside such part, when the deviation is slight and accidental, as where by the swerving of his horse to one side of the wrought part to avoid a mud puddle or because of the natural inclination of the horse to travel on one side, the wheels of his vehicle are brought into contact with an obstacle outside the limits of the prepared track;³ or where the deviation is made necessary because the travelled portion is obstructed or otherwise unsafe, or is in such a condition as to create in the mind of an ordinarily prudent traveller a reasonable belief that

¹ *Indiana.* *Fowler v. Linquist*, 138 Ind. 566 (1894), (37 N. E. Rep. 133).

Maine. *Bryant v. Biddeford*, 39 Me. 193 (1855).

Massachusetts. *Snow v. Adams*, 1 Cush. (Mass.) 443 (1848); *Arey v. Newton*, 148 Mass. 598 (1889), (20 N. E. Rep. 327).

New Hampshire. *Willey v. Portsmouth*, 35 N. H. 303 (1857).

Vermont. *Morse v. Richmond*, 41 Vt. 435 (1868); *Drew v. Sutton*, 55 Vt. 586 (1882).

Wisconsin. *Boltz v. Sullivan*, 101 Wis. 608 (1899), (77 N. W. Rep. 870).

² *Bryant v. Biddeford*, 39 Me. 193 (1855); *Warner v. Holyoke*, 112 Mass. 362 (1873).

³ *Cassedy v. Stockbridge*, 21 Vt. 391 (1849); *Boltz v. Sullivan*, 101 Wis. 608 (1899), (77 N. W. Rep. 870).

it is dangerous;¹ or where the deviation is made necessary in order to pass another team, whether the latter is moving in the same,² or in the opposite,³ direction. The burden rests upon the traveller in each of these cases to show also that he acted with due care in making the deviation.⁴

Again, if a traveller can show that the travelled part of the highway has become extended or widened either by the acts of private individuals or by public travel, or that a side track has become established by user, and that the defendant corporation permitted the portion so added or the side track so established to be used for public travel for a long time, and that there was nothing to indicate that such use was unauthorized, he may recover for injuries caused by defects in such added parts of the way, even though the corporation has provided a wrought part safe and sufficient for public travel at that place.⁵

¹ *O'Laughlin v. Dubuque*, 42 Ia. 539 (1876); *Pomeroy v. Westfield*, 154 Mass. 462 (1891), (28 N. E. Rep. 899); *Austin v. Ritz*, 72 Tex. 391, 401 (1888), (9 S. W. Rep. 884); *Green v. Danby*, 12 Vt. 338 (1840); *Kelley v. Fond du Lac*, 31 Wis. 186 (1872). See also *Burr v. Plymouth*, 48 Conn. 460 (1881).

² *Mochler v. Shaftsbury*, 46 Vt. 580 (1874).

³ *Fopper v. Wheatland*, 59 Wis. 623 (1884), (18 N. W. Rep. 514); *Hull v. Richmond*, 2 Woodb. & M. (U. S.) 337 (1846), *semble*.

⁴ *Austin v. Ritz*, 72 Tex. 391, 401 (1888), (9 S. W. Rep. 884); *Kelley v. Fond du Lac*, 31 Wis. 186 (1872).

⁵ *Massachusetts*. *Aston v. Newton*, 134 Mass. 507 (1883); *Lowe v. Clinton*, 136 Mass. 24 (1883); *Moran v. Palmer*, 162 Mass. 196 (1894), (38 N. E. Rep. 442).

New Hampshire. *Willey v. Portsmouth*, 35 N. H. 303, 313 (1857); *Saltmarsh v. Bow*, 56 N. H. 428 (1876); *Stark v. Lancaster*, 57 N. H. 88 (1876).

Vermont. *Whitney v. Essex*, 42 Vt. 520 (1870); *Potter v. Castleton*, 53 Vt. 435 (1881).

Wisconsin. *Cartright v. Belmont*, 58 Wis. 370 (1883), (17 N. W. Rep. 237).

In this last case, at page 373, the court says: "To relieve itself

And, finally, a traveller may still maintain his action if he can show that the limits of the travelled part of the highway were not indicated by any visible objects which would show the course intended for travel, and that the defect which caused the injury, though really outside the travelled part, was within the general course and direction of travel.¹

§ 91. **Defects due to the Plan of Construction.** — There is a marked difference of opinion to be found in the decisions of the various courts, and in some instances even in the decisions of the same court, upon the question whether municipal corporations are liable for injuries suffered while upon the highway by reason of defects that were due to the plan of construction adopted by the municipal authorities. In Michigan, New York, and Pennsylvania from liability when the public travel, or some part of it, has diverged from the prepared track, and has formed another track, equally accessible to travellers, and apparently as much travelled as the other, the town should give some reasonable notice to the public travelling there that the use of the side track is unauthorized. This may be done by placing obstructions thereon, or by putting up notices, or in any other manner which will sufficiently notify travellers that the town desires them to use the graded track alone.”

¹ *Massachusetts.* Coggswell v. Lexington, 4 Cush. 307 (1849); Hayden v. Attleborough, 7 Gray, 338 (1856); Harwood v. Oakham, 152 Mass. 421 (1890), (25 N. E. Rep. 625).

Minnesota. Ray v. St. Paul, 40 Minn. 458 (1889), (42 N. W. Rep. 297).

New Hampshire. Davis v. Hill, 41 N. H. 329 (1860).

New York. Jewhurst v. Syracuse, 108 N. Y. 303 (1888), (15 N. E. Rep. 409).

Wisconsin. Wheeler v. Westport, 30 Wis. 392 (1872).

Compare Marshall v. Ipswich, 110 Mass. 522 (1872).

This rule does not, it seems, apply to sidewalks. See Stockwell v. Fitchburg, 110 Mass. 305, 310 (1872); Stone v. Attleborough, 140 Mass. 328 (1885), (4 N. E. Rep. 570); Damon v. Boston, 149 Mass. 147 (1889), (21 N. E. Rep. 235); Knowlton v. Pittsfield, 62 N. H. 535 (1883). But Kinney v. Tekamah, 30 Neb. 605 (1890), (46 N. W. Rep. 835), is *contra*.

there are cases which lay down the rule that since the determination of the plan in accordance with which a highway is built is in the nature of legislative action, the consequences of that action share in the general immunity which is extended to all legislative action, and that, therefore, no suit can be maintained for injuries due to defects caused by the plan of construction adopted.¹ These decisions are somewhat difficult to reconcile with the principle that the duty of keeping the public ways in a reasonably safe condition for ordinary travel is not a matter of judgment and discretion, but a positive, ministerial duty. Moreover, they can hardly be reconciled in principle with other decisions of the same courts upon the same subject.²

However that may be, the better and more generally accepted view is that municipal corporations may be liable for injuries caused by defects which were due to the plan of construction adopted by them.³ But such is the confusion upon the subject that even from the cases which

¹ Detroit *v.* Beckman, 34 Mich. 125 (1876); Lansing *v.* Toolan, 37 Mich. 152 (1877); Davis *v.* Jackson, 61 Mich. 530 (1886), (28 N. W. Rep. 526); Urquhart *v.* Ogdensburg, 91 N. Y. 67 (1883); Monk *v.* New Utrecht, 104 N. Y. 552 (1887), (11 N. E. Rep. 268); Watson *v.* Kingston, 114 N. Y. 88 (1889), (21 N. E. Rep. 102); Perry Township *v.* John, 79 Pa. St. 412 (1875).

² See Malloy *v.* Walker Township, 77 Mich. 448 (1889), (43 N. W. Rep. 1012); Lehmann *v.* Brooklyn, 30 N. Y. App. Div. 305 (1898), (51 N. Y. Supp. 524).

³ North Vernon *v.* Voegler, 103 Ind. 314 (1885), (2 N. E. Rep. 821); Gould *v.* Topeka, 32 Kan. 485 (1884), (4 Pac. Rep. 822); Blyhl *v.* Waterville, 57 Minn. 115 (1894), (58 N. W. Rep. 817); Conlon *v.* St. Paul, 70 Minn. 216 (1897), (72 N. W. Rep. 1073); Circleville *v.* Sohn, 59 Oh. St. 285 (1898), (52 N. E. Rep. 788). See also Chicago *v.* Gallagher, 44 Ill. 295 (1867); Chicago *v.* Langlass, 66 Ill. 361 (1872); Prideaux *v.* Mineral Point, 43 Wis. 513 (1878), where, without discussion of the question, the defendant corporations were held liable for defects due to the original plan of construction.

hold this latter view it is scarcely possible to extract any uniform rule of liability. In general, however, it may be said that the requirement of these cases is that the municipal corporation shall exercise due care in the selection of a plan of construction, and if it fails to so do, shall be responsible in a private action for the damage that results.

§ 92. A Failure to light the Highway as a Defect. — When municipal corporations have provided public ways that are in proper repair and suitably protected by railings, so as to be reasonably safe for travel in the ordinary modes, they have fulfilled their duty to the travelling public. For, even though the power to furnish light is conferred upon them, they are not, in the absence of any statutory or charter provision making it an absolute duty, under any legal obligation to exercise that power. To do so or not is a matter intrusted entirely to the discretion of the proper municipal authorities. Hence the omission to illuminate their highways does not constitute such a defect as may be made the basis of a private action.¹ And it has been held that the fact that there

¹ *Colorado.* Oliver v. Denver, 13 Col. App. 345 (1899), (57 Pac. Rep. 729).

Georgia. Gaskins v. Atlanta, 73 Ga. 746 (1884); Columbus v. Sims, 94 Ga. 483 (1894), (20 S. E. Rep. 332).

Illinois. Freeport v. Isbell, 83 Ill. 440 (1876); Chicago v. Apel, 50 Ill. App. 132 (1892); Chicago v. McDonald, 57 Ill. App. 250 (1894).

Indiana. Indianapolis v. Scott, 72 Ind. 196, 202 (1880).

Massachusetts. Sparhawk v. Salem, 1 Allen, 30, 32 (1861); Macomber v. Taunton, 100 Mass. 255 (1868); Lyon v. Cambridge, 136 Mass. 419 (1884).

Minnesota. Miller v. St. Paul, 38 Minn. 134 (1888), (36 N. W. Rep. 271); McHugh v. St. Paul, 67 Minn. 441 (1897), (70 N. W. Rep. 5).

Pennsylvania. Canavan v. Oil City, 183 Pa. St. 611, 616 (1898), (38 Atl. Rep. 1096).

is a city ordinance requiring lights to be provided under certain circumstances will not alter this rule.¹

Cases of this class are to be distinguished from those where there is some defect in the highway that ought to be properly guarded in the night-time. In the latter cases the duty to furnish lights is, of course, clear, and the liability for any failure to so do, in consequence of which an injury results to a traveller who is himself in the exercise of due care, is equally clear.²

§ 93. Useful and Necessary Articles as Defects. — It is commonly held that such useful and necessary articles, rightfully placed in the highway, as hitching-posts, stepping-stones, and the like, if properly constructed and located, do not, at least as a matter of law, constitute defects therin.³ "It would be adding to the corporate liability beyond reasonable limits," says Mr. Justice Miller in *Dubois v. Kingston*,⁴ "to hold that stepping-stones, which are almost a necessity in providing for the interest, comfort and convenience of the public in the

¹ *Lyon v. Cambridge*, 136 Mass. 419 (1881).

It is said in some of the cases that if a corporation, acting under the power conferred by statute or charter, undertakes to light its streets, it will be liable if it fails to furnish lights sufficient to afford proper security from danger. *Freeport v. Isbell*, 83 Ill. 440 (1876); *Chicago v. Powers*, 42 Ill. 169 (1866). But see *Columbus v. Sims*, 94 Ga. 483 (1894), (20 S. E. Rep. 332), where it was held that the defendant city, having voluntarily assumed to light its streets, was not bound to do it in such a manner as to enable travellers to see obstructions placed therein by it, irrespective of the question whether such obstruction, which was in this case a water-plug, was a reasonable and proper one, or not.

² *Indianapolis v. Scott*, 72 Ind. 196, 202 (1880); *Canavan v. Oil City*, 183 Pa. St. 611, 616 (1898), (38 Atl. Rep. 1096).

³ *Wellington v. Gregson*, 31 Kan. 99 (1883), (1 Pac. Rep. 253); *Macomber v. Taunton*, 100 Mass. 255 (1868); *Dubois v. Kingston*, 102 N. Y. 219 (1886), (6 N. E. Rep. 273); *Dougherty v. Horseheads*, 159 N. Y. 154 (1899), (53 N. E. Rep. 799).

⁴ 102 N. Y. 219 (1886), (6 N. E. Rep. 273).

maintenance of walks, avenues and streets, constitute a nuisance or obstruction, and that corporations are liable for damages by reason of accidents caused thereby."

But if such articles are not properly constructed and located, they may constitute defects in the highway which will render the corporation responsible for injuries due to them.¹

§ 94. Unguarded Excavations as Defects. — The rule seems to be universal that holes or excavations not properly guarded, whether within the travelled part² or so

¹ Schafer *v.* Mayor, etc. of New York, 154 N. Y. 466 (1897), (48 N. E. Rep. 749); Scranton *v.* Catterson, 94 Pa. St. 202 (1880).

² Alabama. Birmingham *v.* McCary, 84 Ala. 469 (1887), (4 So. Rep. 630); Birmingham *v.* Lewis, 92 Ala. 352 (1890), (9 So. Rep. 243).

Connecticut. Boucher *v.* New Haven, 40 Conn. 456 (1873).

Delaware. Seward *v.* Wilmington, 2 Marv. 189 (1896), (42 Atl. Rep. 451); Carswell *v.* Wilmington, 2 Marv. 360 (1897), (43 Atl. Rep. 169).

Georgia. Savannah *v.* Donnelly, 71 Ga. 258 (1883); Dempsey *v.* Rome, 94 Ga. 420 (1894), (20 S. E. Rep. 335); Americus *v.* Chapman, 94 Ga. 711 (1894), (20 S. E. Rep. 3).

Illinois. Sterling *v.* Thomas, 60 Ill. 264 (1871); Chicago *v.* Hesing, 83 Ill. 204 (1876); Aurora *v.* Seidelman, 34 Ill. App. 285 (1889).

Indiana. Dooley *v.* Sullivan, 112 Ind. 451 (1887), (14 N. E. Rep. 566); Decatur *v.* Stoops, 21 Ind. App. 397 (1899), (52 N. E. Rep. 623).

Iowa. Koester *v.* Ottumwa, 34 Ia. 41 (1871); Crystal *v.* Des Moines, 65 Ia. 502 (1885), (22 N. W. Rep. 646).

Kansas. Fletcher *v.* Ellsworth, 53 Kan. 751 (1894), (37 Pac. Rep. 115).

Kentucky. Covington *v.* Bryant, 7 Bush, 248 (1870).

Louisiana. Cline *v.* Crescent City R. Co., 41 La. An. 1031 (1889), (6 So. Rep. 851).

Maine. Kimball *v.* Bath, 38 Me. 219 (1854); Butler *v.* Bangor, 67 Me. 385 (1877).

Maryland. Baltimore *v.* Pendleton, 15 Md. 12 (1859).

Massachusetts. Doherty *v.* Waltham, 4 Gray, 596 (1855); Myers *v.* Springfield, 112 Mass. 489 (1873).

Michigan. Detroit *v.* Corey, 9 Mich. 165 (1861); Alexander *v.* Big

near thereto as to render travel on such part unsafe,¹ constitute defects in the highway. In the application of this
Rapids, 76 Mich. 282 (1889), (42 N. W. Rep. 1071); *Monje v. Grand
Rapids*, 81 N. W. Rep. 574 (1900).

Minnesota. *Cleveland v. St. Paul*, 18 Minn. 279 (1872); *O'Gorman
v. Morris*, 26 Minn. 267 (1879), (3 N. W. Rep. 349).

Missouri. *Halpin v. Kansas City*, 76 Mo. 335 (1882); *Brennan v.
St. Louis*, 92 Mo. 482 (1887), (2 S. W. Rep. 481); *Baldwin v. Spring-
field*, 141 Mo. 205 (1897), (42 S. W. Rep. 717).

Nebraska. *Omaha v. Randolph*, 30 Neb. 699 (1890), (46 N. W.
Rep. 1013); *Omaha v. Jensen*, 35 Neb. 68 (1892), (52 N. W. Rep.
833); *Lincoln v. Calvert*, 39 Neb. 305 (1894), (58 N. W. Rep. 115).

New Hampshire. *Grimes v. Keene*, 52 N. H. 330 (1872); *Sides v.
Portsmouth*, 59 N. H. 24 (1879).

New York. *Wilson v. Troy*, 60 Hun, 183 (1891), (14 N. Y. Supp.
721); *Roach v. Ogdensburg*, 91 Hun, 9 (1895), (36 N. Y. Supp. 112).

Ohio. *Circleville v. Nending*, 41 Oh. St. 465 (1885).

Oregon. *McAllister v. Albany*, 18 Oreg. 426 (1890), (23 Pac.
Rep. 845).

Pennsylvania. *Sutter v. Young Township*, 130 Pa. St. 72 (1889),
(18 Atl. Rep. 610).

Rhode Island. *Seamons v. Fitts*, 20 R. I. 443 (1898), (40 Atl.
Rep. 3).

Tennessee. *Memphis v. Lasser*, 9 Humph. 757 (1849).

Vermont. *Willard v. Newbury*, 22 Vt. 458 (1850); *Batty v. Dux-
bury*, 24 Vt. 155 (1852).

Washington. *Rowe v. Ballard*, 19 Wash. 1 (1898), (52 Pac. Rep. 321).

Wisconsin. *Seward v. Milford*, 21 Wis. 485 (1867); *Hart v. Red
Cedar*, 63 Wis. 634 (1885), (24 N. W. Rep. 410); *Wiltse v. Tilden*,
77 Wis. 152 (1890), (46 N. W. Rep. 234); *Rumrill v. Delafield*, 82
Wis. 184 (1892), (52 N. W. Rep. 261); *Little v. Iron River*, 102 Wis.
250 (1899), (78 N. W. Rep. 416).

As to the duty, and consequent liability, of the corporation when
the excavation is a cellarway under, or in close proximity to, the
street, see *Beardsley v. Hartford*, 50 Conn. 529 (1883); *Augusta v.
Hafers*, 59 Ga. 151 (1877); *Smith v. Leavenworth*, 15 Kan. 81 (1875);
Witham v. Portland, 72 Me. 539 (1881); *Fitzgerald v. Berlin*, 51 Wis.
81 (1881), (7 N. W. Rep. 836).

Where the excavation was a coal-hole, see *Lafayette v. Blood*, 40
Ind. 62 (1872); *Harriman v. Boston*, 114 Mass. 241 (1873); *Welsh v.
Amesbury*, 170 Mass. 437 (1898), (49 N. E. Rep. 735).

¹ *Beardsley v. Hartford*, 50 Conn. 529 (1883); *Bassett v. St. Joseph*,
53 Mo. 290 (1873); *Stack v. Portsmouth*, 52 N. H. 221 (1872).

rule it makes no difference whether such holes or excavations were made by the corporation itself, by its own agents, or by an independent contractor employed by it; or were made by some third person, or by the action of the elements: in each case the liability of the corporation is the same, provided it knew, or by the exercise of reasonable care and diligence might have known, of their existence without proper guards in time to have prevented the accident.¹

§ 95. **Insecure Projections as Defects.** — In Massachusetts, and elsewhere to a limited extent, the rule has become established that a structure, erected by the owner of abutting premises over the sidewalk, which is so insecure and defective as to be likely to fall, is a defect in the highway for which a person injured by its fall may recover compensation from the corporation, provided that such structure can fairly be considered, not as a mere incident of the building to which it is attached, but as in some sense related to, and a part of, the sidewalk itself.² The typical cases within this rule are, of course, those relating to insecure awnings,³ although it has been extended so as to include the case of a temporary transparency, fastened at one end to a building and supported at the other end by a pole resting on the sidewalk, which

¹ See cases cited in above notes.

² *Drake v. Lowell*, 13 Met. (Mass.) 292 (1847); *Jones v. Boston*, 104 Mass. 75 (1870); *Pratt v. Weymouth*, 147 Mass. 245, 251 (1888), (17 N. E. Rep. 538); *Hewison v. New Haven*, 34 Conn. 136 (1867); *Hume v. Mayor, etc. of New York*, 74 N. Y. 264, 270 (1878).

³ *Drake v. Lowell*, 13 Met. (Mass.) 292 (1847); *Day v. Milford*, 5 Allen (Mass.), 98 (1862); *Hume v. Mayor, etc. of New York*, 74 N. Y. 264, 270 (1878); *Bieling v. Brooklyn*, 120 N. Y. 98 (1890), (24 N. E. Rep. 389). See also *Larson v. Grand Forks*, 3 Dak. 307 (1884), (19 N. W. Rep. 414); *Bohen v. Waseca*, 32 Minn. 176 (1884), (19 N. W. Rep. 730), which are accord in result. See also *Merrill v. Portland*, 4 Cliff. (U. S.) 138 (1870).

was put up in such an insecure manner as to fall upon and injure a passer-by.¹ But the case of a sign or flag insecurely hung out over the highway from the abutting premises to which alone they were attached,² and the case of snow and ice projecting over the sidewalk from the roof of an adjoining building,³ have been held not to fall within this rule.

The distinction between these latter decisions and the awning cases has been stated by Mr. Justice Wells, in *Jones v. Boston*,⁴ to be that "the awning differs from the overhanging sign, or ice, in that it is not a mere incident or attachment of the building alone, but is a structure erected with reference, in part at least, to the use of the sidewalk as such. The structure itself, being adapted to the sidewalk, in some measure, as a part of its construction and arrangement for use as a sidewalk, a danger from its insecure condition may reasonably be treated as arising from a defective or unsafe condition of the sidewalk."

In the case of *Grove v. Fort Wayne*,⁵ the Indiana court, on the ground that the duty of municipal corporations as to highways extends not merely to conditions that exist upon the surface of the ground over which the road is constructed, but as well to conditions that exist entirely above the surface, laid down a broader rule of liability, holding that the defendant city was liable for injuries received by a passer-by through the fall of an insecure cornice that projected from the building of which it was

¹ *West v. Lynn*, 110 Mass. 514 (1872).

² *Hewison v. New Haven*, 34 Conn. 136 (1867); *Jones v. Boston*, 104 Mass. 75 (1870); *Taylor v. Peckham*, 8 R. I. 349 (1866).

³ *Hixon v. Lowell*, 13 Gray (Mass.) 59 (1859).

⁴ 104 Mass. 75, 77 (1870).

⁵ 45 Ind. 429 (1874).

a part out over the sidewalk. Although the soundness of the decision in that case has been somewhat questioned in a later Indiana case,¹ there are indications that a rule upon this subject somewhat broader than the one prevailing in Massachusetts might be adopted in states where the common law liability of municipal corporations is recognized and enforced.²

§ 96. Insecure Structures adjacent to the Highway as Defects. — It has been held in several instances that municipal corporations are liable for injuries received by a traveller by the fall of insecure structures that stood on land adjacent to the highway. These decisions are put upon the ground that since the defendant corporation possessed the power to abate nuisances of that character, but failed to exercise it, it is bound to respond in damages for the injuries suffered in consequence of such failure — the inference being that, in the absence of such

¹ *Anderson v. East*, 117 Ind. 126 (1888), at page 129 (19 N. E. Rep. 726).

² See *Larson v. Grand Forks*, 3 Dak. 307 (1884), (19 N. W. Rep. 414); *Bohen v. Waseca*, 32 Minn. 176 (1884), (19 N. W. Rep. 730); *Norristown v. Moyer*, 67 Pa. St. 355 (1871).

As to shade-trees that have been set out along the highway constituting a defect therein by reason of their unsound condition, see *Jones v. New Haven*, 34 Conn. 1 (1867); *Chase v. Lowell*, 149 Mass. 85 (1889), (21 N. E. Rep. 233); *s. c. 151 Mass. 422 (1890)*, (24 N. E. Rep. 212); *Vosper v. Mayor, etc. of New York*, 49 N. Y. Sup. Ct. 296 (1883); *Gubasco v. Same*, 12 Daly (N. Y.), 183 (1883); *Jones v. Greensboro*, 124 N. C. 310 (1899), (32 S. E. Rep. 675).

For cases holding that a rope stretched across the highway constituted a defect therein, see *Chicago v. Fowler*, 60 Ill. 322 (1871); *French v. Brunswick*, 21 Me. 29 (1842). But see *Barber v. Roxbury*, 11 Allen (Mass.), 318 (1865). And see also *Hardy v. Keene*, 52 N. H. 370 (1872).

In the following cases a live wire hanging in the street was treated as a defect therein. *Roodhouse v. Christian*, 55 Ill. App. 107 (1893); *Bourget v. Cambridge*, 156 Mass. 391 (1892), (31 N. E. Rep. 390).

power, there would be no liability. Thus, municipal corporations have been held responsible for damages caused by the fall of a defective bill-board that stood on land adjoining the sidewalk;¹ so also for damages due to the fall of the partially destroyed walls of a building which had been left standing on premises close to the highway.²

§ 97. **An Illegal Use of the Highway as a Defect.** — The duty to maintain highways in a reasonably safe condition for ordinary travel is performed when the roadbed is kept reasonably smooth and free from obstructions, and is properly protected by railings. Hence the principle is established that “an illegal use of the highway by men, animals, vehicles, engines or any other object, while movable and actually being moved by human will and direction, and neither fixed to, nor resting on, nor remaining in one position within the travelled part of the highway,” does not constitute a defect for which municipal corporations are responsible in damages. Thus, an unlawful assemblage of people in the streets, engaged in the dangerous practice of exploding powder in anvils, has been held not to be a defect in the highway for which a municipal corporation is liable to a person injured by the acts of such assemblage.³ And so also a boy coasting in the highway upon a hand sled is commonly held not to constitute a defect therein, upon which a person who is struck and injured by the moving sled can base an

¹ *Langan v. Atchison*, 35 Kan. 318 (1886), (11 Pac. Rep. 38). But see *Village v. Kallagher*, 52 Oh. St. 183 (1894), (39 N. E. Rep. 144), where the defendant corporation was held not liable for injuries due to the fall of a bill-board which was in sound condition, but was caused to fall by an unprecedented wind-storm.

² *Parker v. Macon*, 39 Ga. 725 (1869); *Grogan v. Broadway Foundry Company*, 87 Mo. 321 (1885).

³ *Campbell v. Montgomery*, 53 Ala. 527 (1875).

action to recover compensation from the defendant corporation.¹

§ 98. Objects that cause Horses to take Fright as Defects. — By the great weight of authority an object in the highway with which a traveller does not come into contact, but which is of such a nature as to cause his horse to take fright, constitutes a defect for which municipal corporations are responsible.² And under this rule it makes no

¹ *Delaware.* *Wilmington v. Vandegrift*, 1 Marv. 5 (1893), (29 Atl. Rep. 1047).

Indiana. *Faulkner v. Aurora*, 85 Ind. 130 (1882); *Lafayette v. Timberlake*, 88 Ind. 330 (1882).

Massachusetts. *Shepherd v. Chelsea*, 4 Allen, 113 (1862); *Pierce v. New Bedford*, 129 Mass. 534 (1880).

Michigan. *Burford v. Grand Rapids*, 53 Mich. 98 (1884), (18 N.W. Rep. 571).

Vermont. *Hutchinson v. Concord*, 41 Vt. 271 (1868); *Weller v. Burlington*, 60 Vt. 28 (1887), (12 Atl. Rep. 215).

Wisconsin. *Schultz v. Milwaukee*, 49 Wis. 254 (1880), (5 N. W. Rep. 342).

See also *Ray v. Manchester*, 46 N. H. 59 (1865), where it appeared that the plaintiff's horse was frightened by people coasting and ran away, so causing the damage, and the defendant city was held liable.

In *Barber v. Roxbury*, 11 Allen (Mass.), 318 (1865), a derrick rope, which was stretched across the road and attached at either end to objects outside the highway, and which did not remain in one position, but was raised and lowered by workmen in the course of their work, was held, under this rule, not to be a defect in the highway for which the defendant town was liable to a person injured by being brought in contact therewith while it was being raised.

See also upon this subject *Edgerly v. Concord*, 59 N. H. 78 (1879).

² *Connecticut.* *Dimock v. Suffield*, 30 Conn. 129 (1861); *Ayer v. Norwich*, 39 Conn. 376 (1872); *Young v. New Haven*, 39 Conn. 435 (1872).

Illinois. *Chicago v. Hoy*, 75 Ill. 530, 531 (1874); *Vandalia v. Huss*, 41 Ill. App. 517 (1891).

Indiana. *Rushville v. Adams*, 107 Ind. 475 (1886), (8 N. E. Rep. 292).

Maine. *Card v. Ellsworth*, 65 Me. 547 (1876).

Maryland. *Kennedy v. Cecil County*, 69 Md. 65 (1888), (14 Atl. Rep. 524).

Michigan. *Simons v. Casco Township*, 105 Mich. 588 (1895), (63 N. W. Rep. 500).

New Hampshire. *Chamberlain v. Enfield*, 43 N. H. 356 (1861); *Bartlett v. Hooksett*, 48 N. H. 18 (1868).

New York. *Champlin v. Penn Yan*, 34 Hun, 33 (1884); affirmed,

difference whether it is the visible appearance of the object or the sound made by it that causes the fright.¹

But in order to fix the liability, it must be established that the object causing the fright was of such a character as to be calculated to frighten horses of ordinary gentleness.² Whether or not it is of such a character is usually a question of fact for the jury to determine;³ and evidence that other horses were or were not frightened by it is generally held to be competent upon this issue.⁴

102 N. Y. 680 (1886); *Burns v. Farmington*, 31 N. Y. App. Div. 364 (1898), (52 N. Y. Supp. 229).

Pennsylvania. *North Manheim Township v. Arnold*, 119 Pa. St. 380 (1888), (13 Atl. Rep. 444); *Baker v. North East Borough*, 151 Pa. St. 234 (1892), (24 Atl. Rep. 1079).

Rhode Island. *Bennett v. Fifield*, 13 R. I. 139 (1880); *Stone v. Langworthy*, 20 R. I. 602 (1898), (40 Atl. Rep. 882).

Texas. *Patterson v. Austin*, 15 Tex. Civ. App. 201 (1897), (39 S. W. Rep. 976).

Vermont. *Morse v. Richmond*, 41 Vt. 435 (1868).

Wisconsin. *Foshay v. Glen Haven*, 25 Wis. 288 (1870); *Bloor v. Delafield*, 69 Wis. 273 (1887), (34 N. W. Rep. 115); *Cairncross v. Pewaukee*, 78 Wis. 66, 70 (1890), (47 N. W. Rep. 13).

¹ See cases cited in above note.

² *Connecticut.* *Ayer v. Norwich*, 39 Conn. 376 (1872).

Maine. *Card v. Ellsworth*, 65 Me. 547 (1876).

New Hampshire. *Bartlett v. Hooksett*, 48 N. H. 18 (1868).

Rhode Island. *Stone v. Langworthy*, 20 R. I. 602, 605 (1898), (40 Atl. Rep. 832).

Wisconsin. *Bloor v. Delafield*, 69 Wis. 273, 278 (1887), (34 N. W. Rep. 115).

³ *Connecticut.* *Ayer v. Norwich*, 39 Conn. 376 (1872).

Illinois. *Vandalia v. Huss*, 41 Ill. App. 517 (1891).

New Hampshire. *Chamberlain v. Enfield*, 43 N. H. 356 (1861); *Bartlett v. Hooksett*, 48 N. H. 18, 21 (1868).

New York. *Burns v. Farmington*, 31 N. Y. App. Div. 364, 371 (1898), (52 N. Y. Supp. 229).

Pennsylvania. *Fritsch v. Allegheny*, 91 Pa. St. 226 (1879).

Wisconsin. *Foshay v. Glen Haven*, 25 Wis. 288 (1870); *Cairncross v. Pewaukee*, 78 Wis. 66, 71 (1890), (47 N. W. Rep. 13); *Laird v. Otsego*, 90 Wis. 25 (1895), (62 N. W. Rep. 1042).

⁴ *Smith v. Sherwood Township*, 62 Mich. 159 (1886), (28 N. W.

Furthermore, if the object causing the fright was placed, or continued, in the highway by some third person, it is essential to the liability to establish the fact that such person was not, in so doing, making such a use of the public way as was, under all the circumstances of the case, reasonable and proper. This is so because private persons have a right to use temporarily a reasonable portion of the highway for any necessary purpose; and such use can, of course, impose no responsibility upon the corporation.¹ This issue also ordinarily raises a question of fact for the jury, though it may, where the facts are not disputed, be decided by the court as a question of law.²

In Maine and Michigan the liability of municipal corporations under this rule is limited to such frightful objects as exist in the travelled part of the highway.³

Rep. 806); *Darling v. Westmoreland*, 52 N. H. 401 (1872); *Champlin v. Penn Yan*, 34 Hun (N. Y.), 33 (1884). *Contra*, *Bloor v. Delafield*, 69 Wis. 273, 277 (1887), (34 N. W. Rep. 115). In this last case the court decided that evidence of this character was not admissible on the ground that it tended to open the door to numerous and perplexing side issues, such as the condition of the other horse, — whether blind or not; the speed at which it was driven; its character, — whether skittish or not; the manner in which it was driven, — whether carefully or not; and like questions.

In *Champlin v. Penn Yan*, 34 Hun (N. Y.), 33 (1884), it was held to be competent to show that other horses had been frightened at a prior time by, not the same, but a similar, object, similarly located.

¹ *Bartlett v. Hooksett*, 48 N. H. 18, 20 (1868); *North Manheim Township v. Arnold*, 119 Pa. St. 380, 389 (1888), (13 Atl. Rep. 444); *Cairncross v. Pewaukee*, 78 Wis. 66 (1890), (47 N. W. Rep. 13).

² *Loberg v. Amherst*, 87 Wis. 634 (1894), (58 N. W. Rep. 1048).

³ *Maine*. *Card v. Ellsworth*, 65 Me. 547 (1876); *Nichols v. Athens*, 66 Me. 402 (1877); *Farrell v. Oldtown*, 69 Me. 72 (1879).

Michigan. *Agnew v. Corunna*, 55 Mich. 428 (1885), (21 N. W. Rep. 873); *Beall v. Athens Township*, 81 Mich. 536 (1890), (45 N. W. Rep. 1014). See also *Simons v. Casco Township*, 105 Mich. 588 (1895), (63 N. W. Rep. 500).

As a general rule, however, they are held to be liable as well if such object is in the untravelled part as if in the travelled part.¹

The doctrine has become well established in Massachusetts, and has been adopted in South Carolina, that an object with which a traveller does not come into contact does not constitute a defect in the highway for the sole reason that it is of such a nature as to cause his horse to take fright.² In the practical application of this doctrine it makes no difference whether the fright is caused by the visible appearance of the object,³ or by sound;⁴ nor yet whether the object that causes the fright be outside the travelled part,⁵ or within the travelled part;⁶ nor again, whether it constitutes in itself an actual defect in the highway,⁷ or does not in itself constitute a defect:⁸ in each case alike no liability attaches to the corporation. But it seems that even under this doctrine, if his

¹ Connecticut. *Dimock v. Suffield*, 30 Conn. 129 (1861).

New Hampshire. *Chamberlain v. Enfield*, 43 N. H. 356 (1861).

Pennsylvania. *North Manheim Township v. Arnold*, 119 Pa. St. 380, 389 (1888), (13 Atl. Rep. 444).

Texas. *Patterson v. Austin*, 15 Tex. Civ. App. 201 (1897), (39 S. W. Rep. 976).

Vermont. *Morse v. Richmond*, 41 Vt. 435, 438 (1868).

Wisconsin. *Foshay v. Glen Haven*, 25 Wis. 288 (1870).

² Massachusetts. *Keith v. Easton*, 2 Allen, 552 (1861); *Cook v. Charlestown*, 98 Mass. 80 (1867); *Bemis v. Arlington*, 114 Mass. 507, 509 (1874); *Lincoln v. Boston*, 148 Mass. 578, 581 (1889), (20 N. E. Rep. 329), *semble*.

South Carolina. *Dunn v. Barnwell*, 43 S. C. 398 (1895), (21 S. E. Rep. 315).

³ *Cook v. Montague*, 115 Mass. 571 (1874).

⁴ *Bowes v. Boston*, 155 Mass. 344, 350 (1892), (29 N. E. Rep. 633).

⁵ *Keith v. Easton*, 2 Allen (Mass.), 552 (1861).

⁶ *Kingsbury v. Dedham*, 13 Allen (Mass.), 186 (1866).

⁷ *Cook v. Charlestown*, 13 Allen (Mass.), 190, n. (1866); s. c. 98 Mass. 80 (1867).

⁸ *Cook v. Montague*, 115 Mass. 571 (1874).

horse is frightened by one object, and in consequence he is brought in contact with another object which is a defect in the highway and is injured thereby, the traveller may recover for the damage so suffered.¹

§ 99. **Snow and Ice as a Defect.** — The responsibility of municipal corporations relative to accumulations of snow or ice in the highway is comparatively limited. While the law exacts from them the same degree of diligence in removing obstructions of this character as in removing any other obstruction,² it recognizes the fact that the circumstances under which the diligence is to be exercised are oftentimes very exceptional; that in the rigorous climate of our northern states large accumulations of snow, the removal of which will involve much time and expense, may cover many miles of highway in a brief space of time;³ and that a smooth coating of ice, which it is practically impossible to remove, is likely to form

¹ *Bigelow v. Weston*, 3 Pick. (Mass.) 267 (1825); *Bly v. Haverhill*, 110 Mass. 520 (1872); *Woods v. Groton*, 111 Mass. 357 (1873); *Cushing v. Bedford*, 125 Mass. 526 (1878).

² The liability is based on negligence. *Landolt v. Norwich*, 37 Conn. 615 (1871); *Chicago v. Richardson*, 75 Ill. App. 198 (1897); *Hubbard v. Concord*, 35 N. H. 52, 68 (1857); *Todd v. Troy*, 61 N. Y. 506 (1875); *Kaveny v. Troy*, 108 N. Y. 571 (1888), (15 N. E. Rep. 726). And whether or not the corporation was negligent in not removing the snow or ice before the accident happened is usually a question for the jury. *Congdon v. Norwich*, 37 Conn. 414 (1870); *Nebraska City v. Rathbone*, 20 Neb. 288 (1886), (29 N. W. Rep. 920); *Allison v. Middletown*, 101 N. Y. 667 (1886), (5 N. E. Rep. 334).

³ As to the liability for a failure to remove drifts of snow, see *Rogers v. Newport*, 62 Me. 101 (1873); *Dutton v. Weare*, 17 N. H. 34 (1845); *Green v. Danby*, 12 Vt. 338 (1840); *McCabe v. Hammond*, 34 Wis. 590 (1874). If the general state of the highway is such that wheeled vehicles are used on it, it is the duty of the corporation to remove accumulations of snow that remain in particular places in such quantities as to obstruct the passage of such vehicles. *Dutton v. Weare*, 17 N. H. 34 (1845).

upon the sidewalks quickly and often during the winter season.¹

Influenced largely by considerations of this kind, the courts of the various states have held with much unanimity of opinion that the bare fact that a highway which was properly constructed and of no unusual slope, had become slippery by reason of the existence of a coating of ice which presented a smooth and polished surface, over which it was difficult to pass without being exposed to the danger of a fall, does not constitute a defect for which municipal corporations are responsible.² If, how-

¹ "When the streets have been wholly or partially cleaned," says Mr. Justice Finch in *Taylor v. Yonkers*, 105 N. Y. 202 (1887), (11 N. E. Rep. 642), at page 206, "it often happens that a fall of rain or the melting of adjoining snow is suddenly followed by severe cold, which covers everything with a film or layer of ice and makes the walks slippery and dangerous. This frozen surface it is practically impossible to remove until a thaw comes which remedies the evil. The municipality is not negligent for awaiting that result. It may and should require householders, when the danger is great, to sprinkle upon the surface ashes or sand or the like, as a measure of prudence and precaution, but is not responsible for their omission. It is no more bound to put upon the ice, which it cannot reasonably remove, such foreign material than to cover it with boards. The emergency is one which is common to every street in the village or city, and which the corporation is powerless to combat. Usually it lasts but a few days, and the corporate authorities may await without negligence a change of temperature which will remove the danger."

Upon the question of the impossibility of removing ice, see also *Peard v. Mount Vernon*, 83 Hun (N. Y.), 250 (1894), (31 N. Y. Supp. 395); *Kleng v. Buffalo*, 72 Hun (N. Y.), 541 (1893), (25 N. Y. Supp. 445), affirmed in 156 N. Y. 700 (1898), (51 N. E. Rep. 1091); *Staley v. Mayor, etc. of New York*, 37 N. Y. App. Div. 598 (1899), (56 N. Y. Supp. 237).

² *Illinois.* *Gibson v. Johnson*, 4 Ill. App. 288 (1879); *Aurora v. Parks*, 21 Ill. App. 459 (1885).

Iowa. *Broburg v. Des Moines*, 63 Ia. 523 (1884), (19 N. W. Rep. 340).

Maine. *Smythe v. Bangor*, 72 Me. 249 (1881).

Massachusetts. *Stanton v. Springfield*, 12 Allen, 566 (1866); Hutch-

ever, such smooth coating of ice is formed upon the highway because of the improper construction, or the defective condition, of the highway itself,¹ or because of the negligence of the municipal authorities to properly care for the drains,² gutters,³ conductors,⁴ catch-basins,⁵ and the
ius v. Boston, 12 Allen, 571, n. (1866); *Johnson v. Lowell*, 12 Allen, 572, n. (1866); *Nason v. Boston*, 14 Allen, 508 (1867); *Gilbert v. Roxbury*, 100 Mass. 185 (1868); *Billings v. Worcester*, 102 Mass. 329 (1869); *Pinkham v. Topsfield*, 104 Mass. 78, 83 (1870).

Minnesota. *Henkes v. Minneapolis*, 42 Minn. 530 (1890), (44 N. W. Rep. 1026).

Nebraska. *Bell v. York*, 31 Neb. 842 (1891), (48 N. W. Rep. 878).

New York. *Kinney v. Troy*, 108 N. Y. 567 (1888), (15 N. E. Rep. 728); *Tobey v. Hudson*, 49 Hun, 318 (1888), (2 N. Y. Supp. 180); *Buck v. Glens Falls*, 4 N. Y. App. Div. 323 (1896), (38 N. Y. Supp. 582).

Ohio. *Chase v. Cleveland*, 44 Oh. St. 505 (1886), (9 N. E. Rep. 225).

Pennsylvania. *Mauch Chunk v. Kline*, 100 Pa. St. 119 (1882); *Wyman v. Philadelphia*, 175 Pa. St. 117 (1896), (34 Atl. Rep. 621), *semble*.

Virginia. *Lynchburg v. Wallace*, 95 Va. 640 (1898), (29 S. E. Rep. 675).

Washington. *Calder v. Walla Walla*, 6 Wash. 377 (1893), (33 Pac. Rep. 1054).

Wisconsin. *Cook v. Milwaukee*, 24 Wis. 270 (1869); *Perkins v. Fond du Lac*, 34 Wis. 435 (1874), *semble*; *Beaton v. Milwaukee*, 97 Wis. 416 (1897), (73 N. W. Rep. 53); *Hyer v. Janesville*, 101 Wis. 371 (1898), (77 N. W. Rep. 729), *semble*.

But see *Clonghessey v. Waterbury*, 51 Conn. 405 (1883); *Dooley v. Meriden*, 44 Conn. 117 (1876).

¹ *Fitzgerald v. Woburn*, 109 Mass. 204 (1872); *Spellman v. Chicopee*, 131 Mass. 443 (1881); *Adams v. Chicopee*, 147 Mass. 440 (1888), (18 N. E. Rep. 231); *Gilbrie v. Lockport*, 122 N. Y. 403 (1890), (25 N. E. Rep. 357). But see *Chamberlain v. Oshkosh*, 84 Wis. 289 (1893), (54 N. W. Rep. 618).

² *Woolsey v. Ellenville*, 61 Hun (N. Y.), 136 (1891), (15 N. Y. Supp. 647); *Decker v. Scranton*, 151 Pa. St. 241 (1892), (25 Atl. Rep. 36).

³ *Gaylord v. New Britain*, 58 Conn. 398 (1890), (20 Atl. Rep. 365).

⁴ *McGowan v. Boston*, 170 Mass. 384 (1898), (49 N. E. Rep. 633); *Todd v. Troy*, 61 N. Y. 506 (1875); *Darling v. Mayor, etc. of New York*, 18 Hun (N. Y.), 340 (1879).

⁵ *Chicago v. Smith*, 48 Ill. 107 (1868); *Hall v. Lowell*, 10 Cush.

like, there may be a defect for which the corporation can be made to respond in damages to a person who suffers an injury through a fall upon such ice.

It is also held with equal unanimity of opinion that if the snow or ice, instead of presenting a smooth surface, has accumulated in ridges, or has assumed a rough and uneven condition or such a shape as to be in some sense a real obstruction to travel, either by reason of drifting, or of the repeated flowing and freezing of water, or of the passing to and fro of travellers, or from any other cause, it is a defect in the highway; and the fact that it is also slippery does not make it the less a defect.¹ Moreover,

(Mass.) 260 (1852); *Bishop v. Goshen*, 120 N. Y. 337 (1890), (24 N. E. Rep. 720).

In *Corbett v. Troy*, 53 Hun (N. Y.), 228 (1889), (6 N. Y. Supp. 381), the ice was due to a leaky hydrant.

For cases discussing the liability where the ice is formed by the dripping of water from the eaves of an adjoining building, or the like, see *Kaveny v. Troy*, 108 N. Y. 571 (1888), (15 N. E. Rep. 726); *Thompson v. Saratoga Springs*, 22 N. Y. App. Div. 186 (1897), (47 N. Y. Supp. 1032); *Miller v. Bradford*, 186 Pa. St. 164 (1898), (40 Atl. Rep. 409); *Hausmann v. Madison*, 85 Wis. 187 (1893), (55 N. W. Rep. 167).

¹ *Illinois. Aurora v. Parks*, 21 Ill. App. 459 (1885).

Iowa. Collins v. Council Bluffs, 32 Ia. 324 (1871); *Broburg v. Des Moines*, 63 Ia. 523 (1884), (19 N. W. Rep. 340); *Huston v. Council Bluffs*, 101 Ia. 33 (1897), (69 N. W. Rep. 1130); *Hodges v. Waterloo*, 109 Ia. 444 (1899), (80 N. W. Rep. 523).

Massachusetts. Luther v. Worcester, 97 Mass. 268 (1867); *Stone v. Hubbardston*, 100 Mass. 49 (1868); *Morse v. Boston*, 109 Mass. 446 (1872); *McAuley v. Boston*, 113 Mass. 503 (1873); *Williams v. Lawrence*, 113 Mass. 506 n. (1873). But see *Acts 1896*, ch. 540, § 1.

Missouri. Norton v. St. Louis, 97 Mo. 537 (1888), (11 S. W. Rep. 242).

Nebraska. Nebraska City v. Rathbone, 20 Neb. 288 (1886), (29 N. W. Rep. 920).

New York. Todd v. Troy, 61 N. Y. 506 (1875); *Harrington v. Buffalo*, 121 N. Y. 147 (1890), (24 N. E. Rep. 186); *Keane v. Waterford*, 130 N. Y. 188 (1891), (29 N. E. Rep. 130); *Stone*

the liability for injuries suffered by reason of snow or ice upon the highway which had been permitted to assume, and remain for an unreasonable length of time in, the form of mounds and ridges, is not escaped nor in any way affected by the fact that there was a city ordinance requiring the abutting property owner to remove such accumulations.¹

v. Poughkeepsie, 15 N. Y. App. Div. 582 (1897), (44 N. Y. Supp. 609).

Pennsylvania. *McLaughlin v. Corry*, 77 Pa. St. 109 (1874); *Wyman v. Philadelphia*, 175 Pa. St. 117 (1896), (34 Atl. Rep. 621); *Miller v. Bradford*, 186 Pa. St. 164 (1898), (40 Atl. Rep. 409).

Utah. *Scoville v. Salt Lake City*, 11 Utah, 60 (1895), (39 Pac. Rep. 481).

Virginia. *Lynchburg v. Wallace*, 95 Va. 640 (1898), (29 S. E. Rep. 675).

Washington. *Calder v. Walla Walla*, 6 Wash. 377 (1893), (33 Pac. Rep. 1054), *semble*; *Piper v. Spokane*, 60 Pac. Rep. 138 (1900).

Wisconsin. *Cook v. Milwaukee*, 24 Wis. 270, 274 (1869), *semble*; *Paulson v. Pelican*, 79 Wis. 445 (1891), (48 N. W. Rep. 715).

United States. *Providence v. Clapp*, 17 How. 161 (1854); *Smith v. Chicago*, 38 Fed. Rep. 388 (1889).

¹ *Norton v. St. Louis*, 97 Mo. 537 (1888), (11 S. W. Rep. 242); *Taylor v. Yonkers*, 105 N. Y. 202, 205 (1887), (11 N. E. Rep. 642).

In Massachusetts it is now provided by statute that no city or town shall be liable for any injury received upon the highway by reason of snow or ice thereon, if the place where the injury was received was at the time of the accident otherwise reasonably safe. Acts 1896, ch. 540, § 1. And see *Newton v. Worcester*, 169 Mass. 516, 518 (1897), (48 N. E. Rep. 274).

Under the Michigan statute it is held that there is no liability resting upon municipal corporations for defects in the highway caused by the mere accumulation from natural causes of snow or ice, *McKellar v. Detroit*, 57 Mich. 158 (1885), (23 N. W. Rep. 621); *Kannenberg v. Alpena*, 96 Mich. 53 (1893), (55 N. W. Rep. 614); *Rolf v. Greenville*, 102 Mich. 544 (1894), (61 N. W. Rep. 3); *Gavett v. Jackson*, 109 Mich. 408 (1896), (67 N. W. Rep. 517); even though it be uneven, *Hutchinson v. Ypsilanti*, 103 Mich. 12 (1894), (61 N. W. Rep. 279).

In Ohio it is held that a fall of snow is a temporary impediment; that to impose upon municipal corporations the duty of removing it,

E. THE RELATION OF THE DEFECT TO THE INJURY.

§ 100. The Defect must be the Proximate Cause of the Injury. — In determining the responsibility of wrong-doers, the law disregards remote causes, and looks only at those that are proximate. This familiar rule of law applies as well to municipal corporations as to any other class of wrong-doers. Hence it has become well settled that they are liable in damages only for those direct and immediate consequences that may flow from defects negligently permitted by them to exist in the highway.¹

or of removing ice, from the sidewalks would be very burdensome and involve great expense; and that, unless very exceptional conditions are shown, it would not be negligence for them to fail to remove snow or ice from the sidewalk. *Chase v. Cleveland*, 44 Oh. St. 505 (1886), (9 N. E. Rep. 225).

It is provided by statute in Rhode Island that municipal corporations shall not be liable for an injury caused by snow or ice obstructing the highway, unless notice in writing of the particular obstruction has been given to the surveyor of highways within twenty-four hours of the injury. Gen. Laws 1896, ch. 72, § 13. And see *McCloskey v. Moies*, 19 R. I. 297 (1895), (33 Atl. Rep. 225); *Allen v. Cook*, 45 Atl. Rep. 148 (R. I., 1900).

¹ *Georgia. Gaskins v. Atlanta*, 73 Ga. 746 (1884).

Illinois. Roodhouse v. Christian, 158 Ill. 137 (1895), (41 N. E. Rep. 748).

Indiana. Bluffton v. Mathews, 92 Ind. 213 (1883); *Alexander v. New Castle*, 115 Ind. 51 (1888), (17 N. E. Rep. 200).

Maine. Rogers v. Newport, 62 Me. 101 (1873); *Card v. Ellsworth*, 65 Me. 547 (1873).

Maryland. Kennedy v. Cecil County, 69 Md. 65 (1888), (14 Atl. Rep. 524).

Massachusetts. Harwood v. Lowell, 4 Cush. 310 (1849); *Marble v. Worcester*, 4 Gray, 395 (1855); *Jenks v. Wilbraham*, 11 Gray, 142 (1858); *Raymond v. Haverhill*, 168 Mass. 382 (1897), (47 N. E. Rep. 101); *Davis v. Longmeadow*, 169 Mass. 551 (1897), (48 N. E. Rep. 774).

Michigan. McKeller v. Monitor Township, 78 Mich. 485 (1889), (44 N. W. Rep. 412); *Beall v. Athens Township*, 81 Mich. 536 (1890),

Whatever difference of opinion there may be as to the practical application of this rule to particular sets of facts, there is no difference of opinion as to the rule itself.

§ 101. Whether the Defect must be the Sole Cause of the Injury — Concurring Causes. — In a very few states, but notably in Maine and Massachusetts, the doctrine has become established that the defect in the highway must

(45 N. W. Rep. 1014); *Smith v. Walker Township*, 117 Mich. 14, 18, (1898), (75 N. W. Rep. 141).

New Hampshire. *Judd v. Claremont*, 66 N. H. 418, 419 (1890), (23 Atl. Rep. 427).

Pennsylvania. *Yoders v. Amwell Township*, 172 Pa. St. 447 (1896), (33 Atl. Rep. 1017).

Texas. *Gonzales v. Galveston*, 84 Tex. 3 (1892), (19 S. W. Rep. 284).

Vermont. *Hyde v. Jamaica*, 27 Vt. 443 (1855); *Stickney v. Maidstone*, 30 Vt. 738 (1858).

West Virginia. *Childrey v. Huntington*, 34 W. Va. 457, 464 (1890), (12 S. E. Rep. 536).

In *Roodhouse v. Christian*, 158 Ill. 137 (1895), (41 N. E. Rep. 748), it appeared that the plaintiff tripped because of a defect in the sidewalk, and, falling against an electric wire, was severely burned. The court held that the negligence of the defendant city in permitting its sidewalk to be and to remain in an unsafe condition was the primary cause of the injury, without which he would not have been burned.

In *Kelsey v. Glover*, 15 Vt. 708 (1843), it appeared that while the plaintiff was driving along the highway, a runaway team ran into him and caused the injury complained of; that at the point where the accident happened the highway was so obstructed that the plaintiff could not pull out sufficiently to avoid the runaway. It was held that the plaintiff might recover. The facts in *Merrill v. Claremont*, 58 N. H. 468 (1878), were slightly different. In that case it appeared that the team of one traveller was overturned by a defect in the highway; that his horses were frightened thereby and ran about ninety rods, and then against the plaintiff, who was travelling on the road. It was held that the plaintiff's injury might properly be found to be the natural and probable consequence of the defendant's neglect of duty. But see *Marble v. Worcester*, 4 Gray (Mass.), 395 (1855), where, on similar facts, a different decision was rendered.

be the sole cause of the accident.¹ This doctrine has been strictly interpreted by the Maine court, so strictly that even though the concurring cause was a pure accident for which neither the defendant corporation nor the injured person was responsible, the latter cannot maintain an action for the injury suffered.² The bare fact that besides the defect in the highway, there was another proximate cause of the injury, which contributed directly to it, is enough to debar him from recovering.

But in Massachusetts a more liberal view of the rule has been taken, and it has been held that if the intervening act is innocent, it will not break the causal connection. "It is because the act is wrongful, including under this head negligence, not because it is a concurring cause, that the defendant escapes. If the act which concurs with the defect in producing the result complained of is innocent, and is of a kind which the defendant is bound to expect and to provide for, — such, for instance, as another man's driving upon the road, — the jury may find against the town as well as when a particular state of the

¹ Connecticut. *Bartram v. Sharon*, 71 Conn. 686. 691 (1899), (43 Atl. Rep. 143).

Maine. *Moore v. Abbot*, 32 Me. 46 (1850); *Farrar v. Greene*, 32 Me. 574 (1851); *Coombs v. Topsham*, 38 Me. 204 (1854); *Anderson v. Bath*, 42 Me. 346 (1856); *Moulton v. Sandford*, 51 Me. 127 (1862).

Massachusetts. *Rowell v. Lowell*, 7 Gray, 100 (1856); *Kidder v. Dunstable*, 7 Gray, 104 (1856); *Richards v. Enfield*, 13 Gray, 344 (1859); *Shepherd v. Chelsea*, 4 Allen, 113 (1862); *Babson v. Rockport*, 101 Mass. 93 (1869); *Bemis v. Arlington*, 114 Mass. 507 (1874); *Lyons v. Brookline*, 119 Mass. 491 (1876); *Whitford v. Southbridge*, 119 Mass. 564, 573 (1876).

Pennsylvania. *Schaeffer v. Jackson Township*, 150 Pa. St. 145 (1892), (24 Atl. Rep. 629).

² *Anderson v. Bath*, 42 Me. 346 (1856); *Moulton v. Sanford*, 51 Me. 127 (1862); *Perkins v. Fayette*, 68 Me. 152 (1878); *Aldrich v. Gorham*, 77 Me. 287 (1885).

weather is a concurrent cause.”¹ The innocent intervening act that will not debar an injured person from recovering, under this interpretation of the sole cause doctrine, may be his own act, — as where the plaintiff, without fault on his part,² had been led into a position rendered dangerous by reason of a defect in the highway, and, exercising due care and prudence, voluntarily leaped from his carriage in an attempt to save himself and was injured thereby;³ or it may be the act of a third person, — as where the plaintiff was injured by being pushed from the highway, down an unguarded and dangerous declivity, by a crowd, the action of the crowd being neither wilful nor negligent;⁴ or it may be a pure accident, — as where the plaintiff was injured by the co-operation of a defect in the highway and a failure of a part of his carriage or harness, which failure was not attributable to any lack of prudence or foresight on his part.⁵

The decided weight of authority in this country, however, favors the doctrine that the defect in the highway need not be the sole cause of the injury; that if, beside such defect, there was another cause which contributed directly to the result, but which was not attributable to

¹ Mr. Justice Holmes in *Hayes v. Hyde Park*, 153 Mass. 514, 516 (1891), (27 N. E. Rep. 522).

² If the injured person gets himself into a dangerous situation through his own want of due care, he must extricate himself at his own risk. “A party cannot relieve himself from a dangerous position into which his own fault has brought him and hold the town responsible for the result.” *Little v. Brockton*, 123 Mass. 511 (1878).

³ *Thompson v. Bridgewater*, 7 Pick. (Mass.) 188 (1828); *Lund v. Tyngsboro*, 11 Cush. (Mass.) 563 (1853); *Sears v. Dennis*, 105 Mass. 310 (1870); *Williams v. Leyden*, 119 Mass. 237 (1876); *Flagg v. Hudson*, 142 Mass. 280 (1886), (8 N. E. Rep. 42); *Pomeroy v. Westfield*, 154 Mass. 462 (1891), (28 N. E. Rep. 899).

⁴ *Alger v. Lowell 3 Allen (Mass.)*, 402, 406 (1862).

⁵ *Palmer v. Andover*, 2 Cush. (Mass.) 600 (1849).

the negligence of the injured person, the corporation will still be liable, provided the injury would not have been sustained but for the defect in the highway.¹ Under this rule it has been held that neither the acts of third persons, as the inadvertent or negligent pushing of the injured party from the sidewalk and down a declivity by another boy;² nor the action of the elements, as the freezing of water upon the streets so as to coat them with smooth and slippery ice upon which the plaintiff slips and falls;³ nor a pure accident, as the giving away of some

¹ *Illinois.* Bloomington *v.* Bay, 42 Ill. 503, 509 (1867); Lacon *v.* Page, 48 Ill. 499 (1868); Carterville *v.* Cook, 129 Ill. 152 (1889), (22 N. E. Rep. 14); Belleville *v.* Hoffman, 74 Ill. App. 503 (1897).

Indiana. Crawfordsville *v.* Smith, 79 Ind. 308 (1881); Fowler *v.* Linquist, 138 Ind. 566 (1894), (37 N. E. Rep. 133).

Iowa. Langhammer *v.* Manchester, 99 Ia. 295 (1896), (68 N. W. Rep. 688).

Kansas. Atchison *v.* King, 9 Kan. 550 (1872).

Missouri. Bassett *v.* St. Joseph, 53 Mo. 290 (1873); Hull *v.* Kansas City, 54 Mo. 598 (1874); Brennan *v.* St. Louis, 92 Mo. 482 (1887), (2 S. W. Rep. 481); Vogelgesang *v.* St. Louis, 139 Mo. 127 (1897), (40 S. W. Rep. 653); Vogel *v.* West Plains, 73 Mo. App. 588 (1898).

New Hampshire. Clark *v.* Barrington, 41 N. H. 44 (1860); Winship *v.* Enfield, 42 N. H. 197 (1860).

New York. Ayres *v.* Hammondsport, 130 N. Y. 665 (1891), (29 N. E. Rep. 265); Roblee *v.* Indian Lake, 11 N. Y. App. Div. 435, 439 (1896), (42 N. Y. Supp. 326).

North Carolina. Dillon *v.* Raleigh, 124 N. C. 184 (1899), (32 S. E. Rep. 548).

Rhode Island. Hampson *v.* Taylor, 15 R. I. 83 (1885), (8 Atl. Rep. 331); McCloskey *v.* Moies, 19 R. I. 297 (1895), (33 Atl. Rep. 225).

Texas. Gonzales *v.* Galveston, 84 Tex. 3, 7 (1892), (19 S. W. Rep. 284).

Vermont. Hunt *v.* Pownal, 9 Vt. 411 (1837); Kelsey *v.* Glover, 15 Vt. 708 (1843); Fletcher *v.* Barnet, 43 Vt. 192 (1870).

Wisconsin. Houfe *v.* Fulton, 29 Wis. 296, 302 (1871); McFarlane *v.* Sullivan, 99 Wis. 361, 366 (1898), (74 N. W. Rep. 559).

² *Carterville v. Cook*, 129 Ill. 152 (1889), (22 N. E. Rep. 14); *Gonzales v. Galveston*, 84 Tex. 3 (1892), (19 S. W. Rep. 284).

³ *Langhammer v. Manchester*, 99 Ia. 295, 301 (1896), (68 N. W.

part of the vehicle or harness by reason of a defect therein for which the plaintiff was in no way responsible,¹ — will break the causal connection.

In several states this general doctrine is held to be subject to the qualification that if an independent act of a responsible person intervenes and becomes the proximate cause of the injury, there can be no recovery, unless the intervening act was of such a character as might reasonably have been anticipated and provided for.² With this qualification added, the practical difference between the "but for" doctrine and "the sole cause" doctrine as interpreted by the Massachusetts court appears to be little more than a mere matter of words. Under either doctrine, if a wrongful or negligent act of the injured person himself,³ or of a third person,⁴ is a concurrent cause of the injury, there can be no recovery; while the concurrence of an instinctive act of the plaintiff,⁵ or of a

Rep. 688); *Atchison v. King*, 9 Kan. 550, 558 (1872); *Lincoln v. Smith*, 28 Neb. 762 (1890), (45 N. W. Rep. 41); *Lehmann v. Brooklyn*, 30 N. Y. App. Div. 305, 308 (1898), (51 N. Y. Supp. 524); *Hampson v. Taylor*, 15 R. I. 83 (1885), (8 Atl. Rep. 331); *Barton v. Montpelier*, 30 Vt. 650 (1858).

¹ *Wilson v. Atlanta*, 60 Ga. 473, 477 (1878); *Bloomington v. Bay*, 42 Ill. 503 (1867); *Vogel v. West Plains*, 73 Mo. App. 588 (1898); *Clark v. Barrington*, 41 N. H. 44 (1860); *Fletcher v. Barnet*, 43 Vt. 192 (1870).

² *Alexander v. New Castle*, 115 Ind. 51 (1888), (17 N. E. Rep. 200); *Mahogany v. Ward*, 16 R. I. 479 (1889), (17 Atl. Rep. 860); *Childrey v. Huntington*, 34 W. Va. 457, 464 (1890), (12 S. E. Rep. 536); *Houfe v. Fulton*, 29 Wis. 296 (1871).

³ See § 127, *post*, and cases there cited.

⁴ *Bartram v. Sharon*, 71 Conn. 686 (1899), (43 Atl. Rep. 143); *Pratt v. Weymouth*, 147 Mass. 245 (1888), (17 N. E. Rep. 538); *Mahogany v. Ward*, 16 R. I. 479 (1889), (17 Atl. Rep. 860).

⁵ *Lund v. Tyngsboro*, 11 Cush. (Mass.) 563 (1853); *Bassett v. St. Joseph*, 53 Mo. 290, 300 (1873); *Hey v. Philadelphia*, 81 Pa. St. 44 (1876).

In *Stickney v. Maidstone*, 30 Vt. 738 (1858), it appeared that, while

pure accident,¹ will not prevent the maintaining of an action.

§ 102. A Runaway Horse as a Concurring Cause of the Injury. — The duty of municipal corporations, as already indicated, is simply to exercise reasonable care and diligence in order to make their highways safe for the public to use in the ordinary modes. The fact that horses uncontrolled by a driver may run away upon them in no wise increases this obligation; they are not bound to exercise a greater degree of care and diligence so as to make their public ways safe for runaway horses.² If, therefore, municipal corporations have provided a reasonably safe highway for ordinary use, they will not be responsible in damages because a team that was at the time actually running away suffered an injury that might possibly have been avoided if the highway had been guarded with greater care.³ There is in such cases no

driving over a bridge, the plaintiff's horse broke through owing to a defect in the flooring; that, while attempting to extricate him, the plaintiff was struck and injured by the horse in his struggles to free himself. It was held that the defect did not cease to be the direct and proximate cause, until the party had released himself or his property from the imminent and immediate peril directly occasioned by it, and that therefore the town was liable for the plaintiff's injury. *La Duke v. Exeter Township*, 97 Mich. 450, 452 (1893), (56 N. W. Rep. 851), is in accord with this decision. And so also is *Page v. Bucksport*, 64 Me. 51 (1874), although the decision there is rested upon somewhat different grounds.

¹ *Palmer v. Andover*, 2 *Cush.* (Mass.) 600 (1849); *Vogel v. West Plains*, 73 Mo. App. 588 (1898); *Clark v. Barrington*, 41 N. H. 44 (1860).

² See *Stacy v. Phelps*, 47 Hun (N. Y.), 54 (1888), and the cases cited in the following note.

³ *Bureau Junction v. Long*, 56 Ill. App. 458 (1894); *Moss v. Burlington*, 60 Ia. 438 (1883), (15 N. W. Rep. 267); *Brown v. Glasgow*, 57 Mo. 156 (1874), *Ring v. Cohoes*, 77 N. Y. 83 (1879), *semble*; *Lane v. Wheeler*, 35 Hun (N. Y.), 606 (1885).

The court held in *Stacy v. Phelps*, 47 Hun (N. Y.), 54 (1888), at page

negligence that stands in the relation of a cause to the injury.

But if the highway is in a defective condition, municipal corporations will, in the opinion of the courts of a majority of the states where the question has arisen, be liable for any injury received in consequence of such defective condition, notwithstanding the fact that the horse was, at the time of the accident, beyond the control of the driver and running away, provided that it was so beyond control and at liberty through no fault of the plaintiff, and provided also that the injury would not have occurred but for the defective condition of the highway.¹ The intervention of the mere brute force or of the

57, that it was not enough, where municipal corporations had failed to do their duty, to say that if they had done it they might have performed it in such a manner as to have prevented the injury complained of, unless their duty required them to so do it that it may have had that effect.

¹ *Connecticut.* *Ward v. North Haven*, 43 Conn. 148 (1875).

Georgia. *Atlanta v. Wilson*, 59 Ga. 544 (1877); *Augusta v. Hudson*, 94 Ga. 135, 138 (1894), (21 S. E. Rep. 289).

Illinois. *Lacon v. Page*, 48 Ill. 499 (1868); *Rockford v. Russell*, 9 Ill. App. 229 (1881); *Joliet v. Shufeldt*, 144 Ill. 403 (1893), (32 N. E. Rep. 969); *Belleville v. Hoffman*, 74 Ill. App. 503 (1897).

Indiana. *Crawfordsville v. Smith*, 79 Ind. 308 (1881); *Fowler v. Linquist*, 138 Ind. 566, 573 (1894), (37 N. E. Rep. 133).

Iowa. *Manderschid v. Dubuque*, 25 Ia. 108 (1868); *Byerly v. Anamosa*, 79 Ia. 204, 208 (1890), (44 N. W. Rep. 359).

Maryland. *Kennedy v. Cecil County*, 69 Md. 65 (1888), (14 Atl. Rep. 524).

Minnesota. *Campbell v. Stillwater*, 32 Minn. 308, 310 (1884), (20 N. W. Rep. 320).

Missouri. *Hull v. Kansas City*, 54 Mo. 598, 601 (1874); *Vogelgesang v. St. Louis*, 139 Mo. 127 (1897), (40 S. W. Rep. 653).

New Hampshire. *Winship v. Enfield*, 42 N. H. 197, 214 (1860), *semble*; *Stark v. Lancaster*, 57 N. H. 88, 92 (1876).

New York. *Ring v. Cohoes*, 77 N. Y. 83, 88 (1879), *semble*; *Ivory*

will of the horse under such circumstances no more serves to break the causal connection than would any other accidental occurrence. "This appears to us," says Mr. Justice Earl in *Ring v. Cohoes*,¹ "to be the reasonable rule. It exacts no duty from municipalities which has not always rested upon them. They must use proper care and vigilance to keep their streets and highways in a reasonably safe and convenient condition for travel. This is an absolute duty which they owe to all travellers; and where the duty is not discharged, and, in consequence thereof, a traveller is injured, without any fault on his part, they incur liability. They are not bound to furnish roads upon which it will be safe for horses to run away, but they are bound to furnish reasonably safe roads; and if they do not, and a traveller is injured by culpable defects in the road, it is no defence that his horse was at the time running away or was beyond his control."

This doctrine, however, is not unanimously accepted. In the view of the courts of a number of states it is considered that the conduct of the horse may be the primary cause of the accident, in the absence of which there would be no injury, and whether it is so or not turns upon the control that the driver had over his horse at the time. The rule developed from this view is thus stated in the leading Massachusetts case of *Titus v. Northbridge*:² "When a horse, by reason of fright, disease or vicious-

v. Deerpark, 116 N. Y. 476 (1889), (22 N. E. Rep. 1080); *Smith v. Clarkstown*, 69 Hun, 155 (1893), (23 N. Y. Supp. 245).

North Carolina. *Dillon v. Raleigh*, 124 N. C. 18 $\frac{1}{2}$ (1899), (32 S. E. Rep. 548).

Texas. *Eads v. Marshall*, 29 S. W. Rep. 170 (1894).

Washington. *White v. Ballard*, 19 Wash. 284 (1898), (53 Pac. Rep. 159).

¹ 77 N. Y. 83 (1879), at page 88.

² 97 Mass. 258, 265 (1867).

ness, becomes actually uncontrollable, so that his driver cannot stop him, or direct his course, or exercise or regain control over his movements, and in this condition comes upon a defect in the highway, or upon a place which is defective for want of a railing, by which an injury is occasioned, the town is not liable for the injury, unless it appears that it would have occurred if the horse had not been so uncontrollable."¹ But under this rule a horse is not to be considered uncontrollable that merely shies or starts, or is momentarily not controlled by his driver.² If it appears, therefore, that the loss of control

¹ This rule prevails in the following states: —

Maine. Coombs *v.* Topsham, 38 Me. 204 (1854); Monlton *v.* Sanford, 51 Me. 127 (1862); Spanlding *v.* Winslow, 74 Me. 528 (1883).

Massachusetts. Davis *v.* Dudley, 4 Allen, 557 (1862); Titus *v.* Northbridge, 97 Mass. 258 (1867); Fogg *v.* Nahant, 98 Mass. 578 (1868); s. c. 106 Mass. 278 (1871); Wright *v.* Templeton, 132 Mass. 49, 51 (1882); Higgins *v.* Boston, 148 Mass. 484, 486 (1889), 20 N. E. Rep. 105).

West Virginia. Smith *v.* County Court, 33 W. Va. 713 (1890), (11 S. E. Rep. 1); Hungerman *v.* Wheeling, 34 S. E. Rep. 778 (1899).

Wisconsin. Houfe *v.* Fulton, 29 Wis. 296 (1871), *semble*; Jackson *v.* Bellevieu, 30 Wis. 250, 258 (1872); Goldsworthy *v.* Linden, 75 Wis. 24, 29 (1889), (43 N. W. Rep. 656); McFarlane *v.* Sullivan, 99 Wis. 361, 365 (1898), (74 N. W. Rep. 559); Ritger *v.* Milwaukee, 99 Wis. 190 (1898), (74 N. W. Rep. 815).

See also Macnugie Township *v.* Merkhoffer, 71 Pa. St. 276 (1872); Pittston *v.* Hart, 89 Pa. St. 389 (1879); Brown *v.* Laurens County, 38 S. C. 282 (1892), (17 S. E. Rep. 21); Mason *v.* Spartanburg County, 40 S. C. 390 (1893), (19 S. E. Rep. 15).

² "The fact that a horse starts or shies at an object in the highway (whether such object is or is not a defect in the way) and is thus brought in contact with a defect, arising either from want of proper repair in the surface of the highway or of sufficient railing at the side of it, is not conclusive against the right of the driver to recover damages against the town for an injury thereby resulting to him; for the most gentle, intelligent and well broken horses will sometimes, in spite of all precautions and efforts of their driver, and yet without in any just sense escaping from his control, swerve out of their direct

over the animal was only momentary, and would have been instantly regained had not the vehicle come into contact with the defect, the above rule will not be applied, but the injured person will be entitled to maintain his action notwithstanding such momentary loss of control.¹

In cases of this character it is for the jury to say whether, upon all the evidence, there was any loss of control of the horse, and, if there was, whether or not it was merely momentary.²

F. THE DUTY NEGLECTED.

§ 103. Negligence the Basis of the Liability. — Before any liability as to its public ways can arise, it must appear that the municipality has failed to exercise due care, under the circumstances, in the maintenance and reparation of them. Negligence is the foundation of its entire responsibility in this regard. Hence the mere existence of a defect in the highway from which a traverse course to avoid a defect, or what seems to them to be a danger, in the road.” Mr. Justice Gray in *Stone v. Hubbardston*, 100 Mass. 49, 54 (1868).

¹ *Maine.* *Aldrich v. Gorham*, 77 Me. 287, 291 (1885); *Morsman v. Rockland*, 91 Me. 264 (1898), (39 Atl. Rep. 995).

Massachusetts. *Britton v. Cummington*, 107 Mass. 347 (1871).

Michigan. *Langworthy v. Green Township*, 95 Mich. 93 (1893), (54 N. W. Rep. 697).

Rhode Island. *Yeaw v. Williams*, 15 R. I. 20 (1885), (23 Atl. Rep. 33).

West Virginia. *Rohrbough v. Barbour County Court*, 39 W. Va. 472 (1894), (20 S. E. Rep. 565).

Wisconsin. *Houfe v. Fulton*, 29 Wis. 296 (1871), *semble*.

² *Harris v. Great Barrington*, 169 Mass. 271, 275 (1897), (47 N. E. Rep. 881).

If the horse was vicious, and the plaintiff knew it or could have ascertained it by the exercise of reasonable diligence and inquiry, the fact is evidence to be considered by the jury as bearing on the question of the plaintiff's due care. *Rockford v. Russell*, 9 Ill. App. 229, 235 (1881).

eller sustains an injury does not, independently of negligence, establish a culpable breach of duty on its part.¹

Whether or not the corporation has been guilty of negligence in any particular case is ordinarily a question of fact for the jury to determine; and this is so even though there is no doubt as to the facts, if there is substantial doubt as to the reasonable and natural inferences to be drawn from them.² But if the facts are undisputed, and the inferences to be drawn from them are clear and certain, the question may be decided by the court as a matter of law.³

§ 104. The Nature of the Duty — Not avoided by Delegation. — The duty that rests upon municipal corporations to maintain their highways in a reasonably safe condition for ordinary travel, does not involve the exercise of judgment and discretion. It does not rest with the legislative department to say whether or not it shall be performed. It is rather purely ministerial, and hence absolute, in character.⁴

Furthermore, it is the absolute duty of the corporations. The law imposes it upon them for wise purposes of public policy, and they cannot, by any act of their

¹ *Graham v. Oxford*, 105 Ia. 705 (1898), (75 N. W. Rep. 473); *Jansen v. Atchison*, 16 Kan. 358 (1876); *Rooney v. Randolph*, 128 Mass. 580 (1880); *Flanders v. Norwood*, 141 Mass. 17 (1886), (5 N. E. Rep. 256); *Hunt v. Mayor, etc. of New York*, 109 N. Y. 134 (1888), (16 N. E. Rep. 320); *Glasier v. Hebron*, 131 N. Y. 447 (1892), (30 N. E. Rep. 239).

² *Graham v. Oxford*, 105 Ia. 705, 707 (1898), (75 N. W. Rep. 473); *Fritsch v. Allegheny*, 91 Pa. St. 226, 228 (1879); *Saylor v. Montesano*, 11 Wash. 328, 334 (1895), (39 Pac. Rep. 653); *Burns v. Elba*, 32 Wis. 635, 612 (1873).

³ *Montgomery v. Wright*, 72 Ala. 411, 421 (1882).

⁴ *Blyhl v. Waterville*, 57 Minn. 115, 119 (1894), (58 N. W. Rep. 817); *Tritz v. Kansas City*, 84 Mo. 632, 639 (1884); *Urquhart v. Ogdensburg*, 91 N. Y. 67, 71 (1883); *Hubbell v. Yonkers*, 35 Hun (N. Y.), 349 (1885); *Hines v. Lockport*, 50 N. Y. 236 (1872).

own, shift it to other parties so as to relieve themselves from responsibility for its performance. If they choose to intrust the duty to third persons, they can do so, but they are nevertheless bound at their peril to see that it is properly performed: they beeome thereby responsible for the negligence of the persons so intrusted, however competent they may be.¹ Hence, neither by a contract with an independent contractor, in which the latter agrees to keep the highway in a safe condition,² nor by a munieipal ordinance, in which the duty to repair is cast upon the abutting property owners,³ can municipal corporations escape liability for any failure to properly perform this duty which results in injury to a traveller.

§ 105. The Extent of the Duty — Not Insurers. — Municipal corporations are not insurers of the safety of persons travelling upon their highways. They are not bound, therefore, to make them absolutely safe under all eireum-

¹ *Rowell v. Williams*, 29 Ia. 210, 213 (1870); *Jansen v. Atchison*, 16 Kan. 358, 385 (1876); *Prentiss v. Boston*, 112 Mass. 43, 48 (1873); *Blessington v. Boston*, 153 Mass. 409 (1891), (26 N. E. Rep. 1113); *Russell v. Columbia*, 74 Mo. 480 (1881); *Davis v. Omaha*, 47 Neb. 836, 842 (1896), (66 N. W. Rep. 859); *Magee v. Troy*, 48 Hun (N. Y.), 383 (1888), (1 N. Y. Supp. 24); *Sproul v. Seattle*, 17 Wash. 256 (1897), (49 Pac. Rep. 489).

² *Jacksonville v. Drew*, 19 Fla. 106 (1882); *Hogan v. Chicago*, 168 Ill. 551, 559 (1897), (48 N. E. Rep. 210); *Southwell v. Detroit*, 74 Mich. 438, 444 (1889), (42 N. W. Rep. 118); *Welsh v. St. Louis*, 73 Mo. 71 (1880); *Circleville v. Neuding*, 41 Oh. St. 465 (1885); *McAlister v. Albany*, 18 Oreg. 426 (1890), (23 Pac. Rep. 845); *Cleveland v. King*, 132 U. S. 295 (1889), (10 S. Ct. Rep. 90).

³ *Baltimore v. Pendleton*, 15 Md. 12 (1859); *Lincoln v. Pirner*, 81 N. W. Rep. 846 (Neb., 1900); *Dallas v. Jones*, 54 S. W. Rep. 606 (Tex., 1898); *McCoull v. Manchester*, 85 Va. 579 (1888), (8 S. E. Rep. 379).

In *Rockford v. Hildebrand*, 61 Ill. 155, 161 (1871), it was held that a provision in the city charter of the defendant imposing the duty of properly maintaining the highways upon the abutting property owners did not relieve the defendant city therefrom.

stances, so as to preclude the possibility of accident: the law does not require them to anticipate unprecedented events and to provide against their possible occurrence. There is no rigid rule requiring them in all cases to keep their public ways perfectly level, nor to maintain the surface of them free from all inequalities and from every possible obstruction to more convenient travel. Any such burden as that is justly regarded by the courts as excessive.¹

The whole extent of their duty, then, is simply to see that their highways are in a reasonably safe condition for travel in the ordinary modes,² both by night and in the

¹ *Connecticut.* *Wilson v. Granby*, 47 Conn. 59, 73 (1879).

Illinois. *Rockford v. Hildebrand*, 61 Ill. 155, 157 (1871).

Indiana. *Indianapolis v. Cook*, 99 Ind. 10, 15 (1884); *Gosport v. Evans*, 112 Ind. 133 (1887), (13 N. E. Rep. 256).

Kansas. *McFarland v. Emporia Township*, 59 Kan. 568, 571 (1898), (53 Pac. Rep. 864).

Mississippi. *Vicksburg v. Hennessy*, 54 Miss. 391 (1877).

New York. *Hubbell v. Yonkers*, 104 N. Y. 434 (1887), (10 N. E. Rep. 858); *Hunt v. Mayor, etc. of New York*, 109 N. Y. 134, 140 (1888), (16 N. E. Rep. 320); *Turner v. Newburgh*, 109 N. Y. 301, 305 (1888), (16 N. E. Rep. 344).

Ohio. *Village v. Kallagher*, 52 Oh. St. 183, 186 (1894), (39 N. E. Rep. 144).

Pennsylvania. *Burns v. Bradford*, 137 Pa. St. 361, 367 (1891), (20 Atl. Rep. 997); *Canavan v. Oil City*, 183 Pa. St. 611, 614 (1898), (38 Atl. Rep. 1096).

Tennessee. *Poole v. Jackson*, 93 Tenn. 62, 68 (1893), (23 S. W. Rep. 57).

Texas. *Shelley v. Austin*, 74 Tex. 608 (1889), (12 S. W. Rep. 753).

Virginia. *Richmond v. Courtney*, 32 Gratt. 792, 798 (1880); *Moore v. Richmond*, 85 Va. 538, 541 (1888), (8 S. E. Rep. 387).

² In *Morrison v. Syracuse*, 45 N. Y. App. Div. 421 (1899), (61 N. Y. Supp. 313), it was held that a person injured while rightfully riding a bicycle on the sidewalk could not recover damages if such sidewalk was in a reasonably safe condition for pedestrians, even though it was not in a reasonably safe condition for bicycle riding. *Wheeler v. Boone*, 108 Ia. 235 (1899), (78 N. W. Rep. 909), *accord.* And in *Leslie v. Grand Rapids*, 120 Mich. 28 (1899), (78 N. W. Rep.

daytime. Reasonable care and diligence under the circumstances is the only requirement; they must take measures to guard against all accidents to travellers who are themselves in the exercise of proper care, that can or ought reasonably to be foreseen and provided for. This requires the exercise on the part of the municipal authorities of a proper degree of constant and active vigilance toward keeping the highways in proper repair;¹ they cannot sit down, close their eyes, and say that they did not know the highway was defective, and so escape responsibility.² But if they have exercised vigilance of that

885), it was held that a person injured by being thrown from a bicycle by reason of the defective condition of the highway could not recover damages from the city if such highway was kept in a reasonably safe and fit condition for ordinary vehicles, such as wagons and carriages.

In a very late Massachusetts case, the court held that a bicycle was not a carriage within the meaning of the statute which provides that a highway shall be kept in repair "so that the same may be reasonably safe and convenient for travellers, with their horses, teams, and carriages at all seasons of the year," and hence that the plaintiff, who was injured by being thrown from her bicycle by reason of a depression in the road, could not recover damages from the defendant town. In the course of the opinion the court says: "It may impose an intolerable burden upon towns to hold them bound to keep their roads in such a state of repair and smoothness that a bicycle could go over them with assured safety." *Richardson v. Danvers*, 176 Mass. 413 (1900).

¹ "To repair," says the court in *Fritsch v. Allegheny*, 91 Pa. St. 226 (1879), at page 228, "means to replace, to restore to sound or good condition after injury or partial destruction. Therefore, to repair a road or street, to restore it to its former condition and give it the essential properties of a suitable public highway, requires the removal of all obstacles cast upon it, which impede its free passage."

² *Georgia. Milledgeville v. Cooley*, 55 Ga. 17, 18 (1875).

Illinois. *Monmouth v. Sullivan*, 8 Ill. App. 50 (1880); *Mansfield v. Moore*, 124 Ill. 133, 137 (1888), (16 N. E. Rep. 246); *Rock Island v. Drost*, 71 Ill. App. 613 (1897); *Streator v. Liebendorfer*, 71 Ill. App. 625 (1897).

Indiana. *Fort Wayne v. De Witt*, 47 Ind. 391 (1874); Michi-

character, and have failed to discover a defect which was latent, there arises no liability against the municipality.¹ *gan City v. Boeckling*, 122 Ind. 39 (1889), (23 N. E. Rep. 518).

Kansas. *Emporia v. Schmidling*, 33 Kan. 485, 489 (1885), (6 Pac. Rep. 893).

Maine. *Morse v. Belfast*, 77 Me. 44, 46 (1885).

Massachusetts. *Rooney v. Randolph*, 128 Mass. 580 (1880); *Flanders v. Norwood*, 141 Mass. 17 (1886), (5 N. E. Rep. 256).

Michigan. *Moore v. Kenockee Township*, 75 Mich. 332 (1889), (42 N. W. Rep. 944).

Mississippi. *Vicksburg v. Hennessy*, 54 Miss. 391 (1877), *semble*; *Nesbitt v. Greenville*, 69 Miss. 22, 29 (1891), (10 So. Rep. 452); *Walker v. Vicksburg*, 71 Miss. 899 (1894), (15 So. Rep. 132).

Missouri. *Smith v. St. Joseph*, 45 Mo. 449 (1870); *Squires v. Chillicothe*, 89 Mo. 226 (1886), (1 S. W. Rep. 23); *Maus v. Springfield*, 101 Mo. 613, 617 (1890), (14 S. W. Rep. 630); *Haniford v. Kansas City*, 103 Mo. 172, 181 (1890), (15 S. W. Rep. 753).

New Hampshire. *Clark v. Barrington*, 41 N. H. 44, 52 (1860); *Howe v. Plainfield*, 41 N. H. 135, 138 (1860).

New York. *Hubbell v. Yonkers*, 104 N. Y. 434 (1887), (10 N. E. Rep. 858); *Hunt v. Mayor, etc. of New York*, 109 N. Y. 134 (1888), (16 N. E. Rep. 320); *Pettengill v. Yonkers*, 116 N. Y. 558, 564 (1889), (22 N. E. Rep. 1095); *Lane v. Hancock*, 142 N. Y. 510 (1894), (37 N. E. Rep. 473); *Beltz v. Yonkers*, 148 N. Y. 67 (1895), (42 N. E. Rep. 401).

Virginia. *Moore v. Richmond*, 85 Va. 538, 541 (1888), (8 S. E. Rep. 387).

Washington. *Sproul v. Seattle*, 17 Wash. 256 (1897), (49 Pac. Rep. 489).

United States. *District of Columbia v. Woodbury*, 136 U. S. 450 (1890), (10 S. Ct. Rep. 990).

In *Kellogg v. Janesville*, 34 Minn. 132, 134 (1885), (24 N. W. Rep. 359), the defendant asked the trial judge to rule that an inspection of the streets made once in two weeks and followed by repairs when necessary was reasonable diligence. The court held that this ruling was properly refused; that no inflexible rule could be laid down as to the frequency with which inspections should be made. "The conditions are liable to be so different in relation to different sidewalks, or different portions of the same walk, and so many contingencies are likely to arise, that it can only be determined from the situation and circumstances of each case whether reasonable care has been exercised in the premises."

¹ *Lombar v. East Tawas*, 86 Mich. 14, 18 (1891), (48 N. W. Rep. 917).

The law fixes the degree of the obligation of municipal corporations relative to highways, and requires them to meet it. The custom of the particular locality, therefore, can neither enlarge nor narrow that obligation,—custom will not require them to do more, nor excuse them for doing less.¹

§ 106. How far the Duty to repair is dependent on Notice. — Whenever defective conditions in the highway are caused by the operation of natural forces, or by the action of persons whose acts are neither directly nor constructively its own, no duty in respect to them arises until the municipality has had actual notice of their existence, or is at fault for not having such notice.² But after it has had notice, either express or implied, of the existence of a defect, no matter how it was caused, the obligation immediately arises to exercise reasonable care and diligence to so restore the highway that it may again be reasonably safe for ordinary travel.³ And, as has been

¹ *Koester v. Ottumwa*, 34 Ia. 41, 43 (1871).

² *Rehberg v. Mayor, etc. of New York*, 91 N. Y. 137, 142 (1883); *Knoxville v. Bell*, 12 Lea (Tenn.), 157, 160 (1883); *Klein v. Dallas*, 71 Tex. 280, 285 (1888), (8 S. W. Rep. 90); and see § 121, *post*.

³ *Alabama*. *Bradford v. Anniston*, 92 Ala. 349 (1890), (8 So. Rep. 683).

Connecticut. *Davis v. Guilford*, 55 Conn. 351, 357 (1887), (11 Atl. Rep. 350).

Illinois. *Chicago v. Hoy*, 75 Ill. 530, 533 (1874).

Indiana. *Logansport v. Justice*, 74 Ind. 378 (1881).

Kansas. *Atchison v. King*, 9 Kan. 550, 557 (1872).

Massachusetts. *Hanscom v. Boston*, 141 Mass. 242 (1886), (5 N. E. Rep. 249); *Stanton v. Salem*, 145 Mass. 476 (1888), (14 N. E. Rep. 519); *Welsh v. Amesbury*, 170 Mass. 437 (1898), (49 N. E. Rep. 735).

Michigan. *McKormick v. West Bay City*, 110 Mich. 265, 269 (1896), (68 N. W. Rep. 148); *Burleson v. Reading*, 110 Mich. 512, 515 (1896), (68 N. W. Rep. 294); *Handy v. Meridian Township*, 114 Mich. 454 (1897), (72 N. W. Rep. 251).

Missouri. *Maus v. Springfield*, 101 Mo. 613, 618 (1890), (14 S. W.

already pointed out,¹ the corporation cannot escape responsibility for the performance of this duty by ordering private persons to make the necessary repairs.²

Whether or not the proper degree of care was exercised after notice is commonly a question for the jury to decide, upon a due consideration of all the facts in the case.³

§ 107. The Effect of the Nature of the Use of the Highway. — The duty of municipal corporations is to maintain

Rep. 630); *Barr v. Kansas City*, 105 Mo. 550, 555 (1891), (16 S. W. Rep. 483); *Richardson v. Marceline*, 73 Mo. App. 360, 364 (1897).

New Hampshire. *Hubbard v. Concord*, 35 N. H. 52 (1857).

New York. *Kunz v. Troy*, 104 N. Y. 344 (1887), (10 N. E. Rep. 442); *Farman v. Ellington*, 46 Hun, 41, 45 (1887).

Ohio. *Dayton v. Taylor's Adm'r*, 62 Oh. St. 11 (1900), (56 N. E. Rep. 480).

Tennessee. *Knoxville v. Bell*, 12 Lea, 157 (1883).

Vermont. *Ozier v. Hinesburgh*, 44 Vt. 220, 229 (1871); *Spear v. Lowell*, 47 Vt. 692, 700 (1874).

Washington. *Sproul v. Seattle*, 17 Wash. 256 (1897), (49 Pac. Rep. 489).

Wisconsin. *McCabe v. Hammond*, 34 Wis. 590 (1874); *Bloor v. Delafield*, 69 Wis. 273 (1887), (34 N. W. Rep. 115).

For a case where it was held that the circumstances called for a greater degree of diligence than ordinary cases, see *Chicago v. Hoy*, 75 Ill. 530, 533 (1874).

Where it appeared that the defect was created on Saturday night, and was not of so dangerous a character but that the road could be used by the exercise of proper care, it was held that the defendant corporation was not bound to turn out and repair it on the Sabbath day. The court adds, however, that if the defect was one eminently dangerous to life and limb, it might be otherwise. *Alexander v. Oshkosh*, 33 Wis. 277 (1873).

In *Bradford v. Anniston*, 92 Ala. 349 (1890), (8 So. Rep. 683), it was held to be no excuse for a failure to perform this duty that the overseer's men were engaged in making repairs elsewhere, in the absence of evidence to show that the defendant had done all it could by means of barriers, signals, or otherwise to render the highway safe.

¹ See § 104, *ante*.

² *Atherton v. Bancroft*, 114 Mich. 241, 246 (1897), (72 N. W. Rep. 208).

³ *McCabe v. Hammond*, 34 Wis. 590, 593 (1874).

their highways in a safe condition for use in the ordinary modes. That is, they are only called upon to keep them in a safe condition for such uses as reasonable care and diligence could anticipate, having in view the exigencies of travel in the particular locality.¹ "The obligation of these municipal corporations is," says Mr. Justice Merrick in the Massachusetts case of *Gregory v. Adams*,² "not to keep all their highways and bridges in the highest possible state of repair, or so as to afford the utmost convenience to those who have occasion to use them; but only in such condition that, having in view the common and ordinary occasions for their use, and what may fairly be required for the proper accommodation of the public at large in the various occupations which may from time to time be pursued, each particular way shall be so wrought, prepared and maintained that it may justly be considered, for all the uses and purposes for which it was laid out and designed, to be reasonably safe and convenient. . . . They are not required to make preparations for the safety or convenience of those who undertake to use those ways in an unusual or extraordinary manner, involving peculiar and special peril and danger, whether it be in respect to the kind or character of animals led or driven, or the magnitude or construction of carriages used, or the bulk or weight of property transported."

§ 108. The Effect of the Extent of the Use of the Highway. — What is necessary in order to keep a highway reasonably safe for ordinary travel also depends in some measure upon the extent of the use to which it is put. Obviously ways that are used infrequently require the

¹ *Wilson v. Granby*, 47 Conn. 59 (1879); *Stinson v. Gardiner*, 42 Me. 248 (1856); *Gregory v. Adams*, 14 Gray (Mass.), 242 (1859); *Sewell v. Cohoes*, 75 N. Y. 45 (1878); *Norristown v. Moyer*, 67 Pa. St. 355 (1871).

² 14 Gray (Mass.), 242 (1859), at pages 246 and 248.

exercise of less care and watchfulness on the part of the municipal authorities in order to keep them reasonably safe than those in the heart of a city where travel is constant and heavy. This does not mean, of course, that the duty of municipal corporations relative to highways is lessened or changed in any degree by the extent of their use: that remains the same in every case,—to keep them reasonably safe. It simply means that the question what is a reasonably safe way is a question of fact, depending upon all the circumstances, and that the quantity and variety of the travel over it is one of those circumstances which is to be taken into consideration.¹

§ 109. **The Effect of the Extent of the Highways.** — The extent of the public ways of a municipality does not affect the degree of care that it is bound to bestow upon them: whether few or many miles in extent, it must exercise such care over them as shall keep them in a reasonably safe condition for travel in the ordinary modes. All the authorities seem to agree upon this much. Some of them, however, go one step further and point out that the extent of the highways of a town is another of those facts that may be material in determining the question whether or not, in any particular case, proper care was exercised. The weight of authority may perhaps be fairly said to

¹ *Connecticut.* *Davis v. Guilford*, 55 Conn. 351, 357 (1887), (11 Atl. Rep. 350).

Illinois. *Flora v. Naney*, 136 Ill. 45, 48 (1891), (26 N. E. Rep. 645).

Iowa. *Graham v. Oxford*, 105 Ia. 705 (1898), (75 N. W. Rep. 473).

Massachusetts. *Fitz v. Boston*, 4 Cush. 365 (1849).

Mississippi. *Whitfield v. Meridian*, 66 Miss. 570, 575 (1889), (6 So. Rep. 244).

New York. *Glasier v. Hebron*, 131 N. Y. 447, 452 (1892), (30 N. E. Rep. 239).

Pennsylvania. *Fritsch v. Allegheny*, 91 Pa. St. 226, 229 (1879).

support the rule that evidence of the number of miles of public ways within the limits of the defendant corporation, to which it must give equal attention, is competent.¹

§ 110. The Effect of the Expense of maintaining the Highways. — Since unreasonable things are not to be exacted from municipal corporations, the element of expense may have an important bearing upon the question what it is reasonable for them to do in order to keep their highways safe for ordinary travel. It is not that there is one standard of duty for the wealthy municipality and another for the poor town. The standard of duty for both is the same. But it is that that standard is the exercise of reasonable care and diligence, — a standard that necessarily varies somewhat according to the circumstances of each case. And the element of expense has been held to be one of those circumstances. Thus where a traveller was injured by being overturned and thrown from his sleigh by a snowdrift in the highway, it was held that the defendant town might show the actual cost of clearing the roads within its limits after the storm that caused the drift in question, and the estimated cost of clearing them if a way for travel had been opened along the middle of the road regardless of drifts, instead of around them as

¹ *Massachusetts.* Sanders *v.* Palmer, 154 Mass. 475 (1891), (28 N. E. Rep. 778); Weeks *v.* Needham, 156 Mass. 289 (1892), (31 N. E. Rep. 8).

Michigan. Medina Township *v.* Perkins, 48 Mich. 67 (1882), (11 N. W. Rep. 810).

New York. Pomfrey *v.* Saratoga Springs, 104 N. Y. 459, 470 (1887), (11 N. E. Rep. 43); Lane *v.* Hancock, 142 N. Y. 510 (1894), (37 N. E. Rep. 473).

Contra: *Iowa.* Lindsay *v.* Des Moines, 68 Ia. 368 (1886), (27 N. W. Rep. 283).

Nebraska. Lincoln *v.* Smith, 28 Neb. 762, 783 (1890), (45 N. W. Rep. 41).

had been done, together with the town valuation and the amount expended each year for the repair of highways.¹

§ 111. The Effect of a Lack of Means with which to make Repairs. — The duty of municipal corporations relative to highways is no greater than the power conferred upon them for its performance.² Hence it is the invariable rule that they cannot be required to make repairs upon their public ways, which will be beyond their corporate power either to raise the money to pay for, or to have made by the use of any other means which they have at their command.

A lack of means with which to make needed repairs does not, however, necessarily release a municipality from this duty to keep its highways reasonably safe for ordinary travel. It is still bound to protect the traveller so far as it has the power. If, therefore, through a want of funds or other resources, it cannot restore a defective way to proper condition, it must then take steps either to close it to public travel, or to guard the dangerous place in it by suitable barriers, or to employ some other effective means to warn the public of the danger, until such time as it can again put the road in proper repair.³

§ 112. The Effect of the Location of Roads operated by Private Corporations within the Highway. — Neither the fact that a railroad crosses or passes along a public way at grade, nor the fact that street-railway tracks have been laid through the streets, of itself relieves a municipal corporation from its duty to maintain such ways in a

¹ Rooney v. Randolph, 128 Mass. 580 (1880).

Accord: Hayes v. Cambridge, 136 Mass. 402 (1884); s. c. 138 Mass. 461 (1885); Perry Township v. John, 79 Pa. St. 412 (1875).

Contra: Winship v. Enfield, 42 N. H. 197 (1860).

² See § 138, *post*, and cases there cited.

³ Birmingham v. Lewis, 92 Ala. 352 (1890), (9 So. Rep. 243); Carney v. Marseilles, 136 Ill. 401 (1891), (26 N. E. Rep. 491).

reasonably safe condition, except in so far as it may be actually prevented from performing that duty by the necessary use of the tracks by the private corporations owning them. As a general rule, therefore, a municipality is primarily responsible for injuries resulting from defects in that part of a highway which is within the limits of the location of a railroad,¹ or of a street railway,² even though the defect is caused by the negligence of the agents of those corporations. But if the defect is due to matters that a proper construction and operation of such roads necessarily place it beyond the power of the municipal corporation to remedy, there is no responsibility.³

§ 113. The Effect of licensing the Creation of the Defective Condition. — There is substantial agreement among

¹ *Maine.* Phillips *v.* Veazie, 40 Me. 96 (1855).

Massachusetts. Davis *v.* Leominster, 1 Allen, 182 (1861); Pollard *v.* Woburn, 104 Mass. 84 (1870).

Minnesota. Campbell *v.* Stillwater, 32 Minn. 308 (1884), (20 N. W. Rep. 320).

New Hampshire. Willey *v.* Portsmouth, 35 N. H. 303, 314 (1857).

Ohio. Zanesville *v.* Fannan, 53 Oh. St. 605 (1895), (42 N. E. Rep. 703).

² *Indiana.* Michigan City *v.* Boeckling, 122 Ind. 39 (1889), (23 N. E. Rep. 518).

Massachusetts. Prentiss *v.* Boston, 112 Mass. 43, 48 (1873); Hawks *v.* Northampton, 116 Mass. 420 (1875); Lawrence *v.* New Bedford, 160 Mass. 227 (1893), (35 N. E. Rep. 459).

Rhode Island. Watson *v.* Tripp, 11 R. I. 98 (1874).

³ *Massachusetts.* Jones *v.* Waltham, 4 Cush. 299 (1849); Vinal *v.* Dorchester, 7 Gray, 421 (1856); Lawrence *v.* New Bedford, 160 Mass. 227 (1893), (35 N. E. Rep. 459).

New Hampshire. Willey *v.* Portsmouth, 35 N. H. 303, 314 (1857).

Ohio. Steubenville *v.* McGill, 41 Oh. St. 235 (1884).

In Fowler *v.* Gardner, 169 Mass. 505, 509 (1897), (48 N. E. Rep. 619), it was held that the defendant town was entitled to have the jury instructed that although portions of the construction of a street railway might present obstacles to travel and dangers to those using vehicles, yet if such portions were necessary to its operation as a street railway, they were not defects in the highway for which it was liable.

the authorities that the granting of a license, in the exercise of a lawful right, to private persons to make an excavation in the highway, or to leave therein articles that constitute an obstruction, does not relieve municipal corporations from all responsibility as to such highway. They still have a duty to perform in order to prevent injury to travellers.¹

The real difference of opinion comes as to the extent of that duty. According to one view the granting of such permission does not make the municipality responsible for the improper conduct of the licensee or of those employed by him to do the work. It is not bound to keep a constant watch over them, but only to exercise due care itself in keeping the way in a reasonably safe condition for use by the public. In short, its responsibility is confined to its own negligence in the care of the streets, and

¹ *Connecticut.* *Boucher v. New Haven*, 40 Conn. 456, 460 (1873), as explained in *Cummings v. Hartford*, 70 Conn. 115, 123 (1897), (38 Atl. Rep. 916).

Georgia. *Augusta v. Cone*, 91 Ga. 714 (1893), (17 S. E. Rep. 1005).

Indiana. *Warsaw v. Dunlap*, 112 Ind. 576 (1887), (11 N. E. Rep. 623).

Kansas. *Abilene v. Cowperthwait*, 52 Kan. 324 (1893), (34 Pac. Rep. 795).

Michigan. *O'Rourke v. Monroe*, 98 Mich. 520 (1894), (57 N. W. Rep. 738).

Missouri. *Stephens v. Macon*, 83 Mo. 345 (1884).

New York. *Masterton v. Mount Vernon*, 58 N. Y. 391 (1874).

Rhode Island. *Seamons v. Fitts*, 20 R. I. 443 (1898), (40 Atl. Rep. 3).

Washington. *Sutton v. Snohomish*, 11 Wash. 24 (1895), (39 Pac. Rep. 273); *Sproul v. Seattle*, 17 Wash. 256 (1897), (49 Pac. Rep. 489).

United States. *Cleveland v. King*, 132 U. S. 295, 303 (1889), (10 S. Ct. Rep. 90); *District of Columbia v. Woodbury*, 136 U. S. 450, 464 (1889), (10 S. Ct. Rep. 990).

does not extend to the negligence of the servants or agents of a private citizen who is acting in the course of a work lawfully undertaken, under a license, for his own purposes.¹ By the other view, the municipality by licensing the work becomes directly responsible for the negligent acts of those engaged in its performance. It is in effect as though the work was done by the city itself.²

If a municipal corporation has no authority to grant the license under which the third person acted in creating the defective condition, a materially different case is presented. By undertaking to grant such a license, it commits a wrong itself which is sufficient to make it directly responsible for any defects in the highway that the licensee may create, he being regarded simply as the agent through whom it does the unlawful act. The distinction between such cases and those where the license is lawful is, of course, that here the granting of the permission was a wrongful act on the part of the municipality which rendered it responsible for all results flowing from it, while in the latter cases the thing licensed is legal, and the wrong consists merely in the manner in which it is carried out.³

¹ *Indiana.* Dooley v. Sullivan, 112 Ind. 451 (1887), (14 N. E. Rep. 566); Warsaw v. Dunlap, 112 Ind. 576, 580 (1887), (11 N. E. Rep. 623).

New York. Masterton v. Mount Vernon, 58 N. Y. 391 (1874); McDermott v. Kingston, 19 Hun, 198 (1879).

Pennsylvania. Susquehanna Depot v. Simmons, 112 Pa. St. 384 (1886), (5 Atl. Rep. 434).

United States. Denver v. Sherret, 88 Fed. Rep. 226 (1898).

² *Savannah v. Donnelly*, 71 Ga. 258 (1883); *Stephens v. Macon*, 83 Mo. 345 (1884); *Haniford v. Kansas City*, 103 Mo. 172 (1890), (15 S. W. Rep. 753); and see also *Boucher v. New Haven*, 40 Conn. 456, 460 (1873).

³ *Stanley v. Davenport*, 54 Ia. 463 (1880), (2 N. W. Rep. 1064);

And so also where the thing licensed is dangerous in itself, it has been held that the corporation is responsible for any injuries resulting to a traveller.¹

G. THE DUTY AS TO RAILINGS, BARRIERS, AND LIGHTS.

§ 114. The Duty to erect Railings. — The obligation of municipal corporations to erect and maintain suitable railings grows out of the duty that rests upon them to maintain their highways in a reasonably safe condition for use by the public. Such protection must be provided where, and only where, it is necessary in order to render the way itself safe for ordinary travel.² They are not

Cohen v. Mayor, etc. of New York, 113 N. Y. 532 (1889), (21 N. E. Rep. 700). See also *Green v. Portland*, 32 Me. 431 (1851).

¹ *Warsaw v. Dunlap*, 112 Ind. 576 (1887), (11 N. E. Rep. 623), *semble*; *Little v. Madison*, 42 Wis. 643 (1877).

² *Connecticut*. *Beardsley v. Hartford*, 50 Conn. 529 (1883).

Georgia. *Zettler v. Atlanta*, 66 Ga. 195 (1880).

Illinois. *Chicago v. Gallagher*, 44 Ill. 295 (1867).

Indiana. *Higert v. Greencastle*, 43 Ind. 574 (1873).

Iowa. *Manderschid v. Dubuque*, 29 Ia. 73 (1870).

Maine. *Willey v. Ellsworth*, 64 Me. 57 (1874); *Haskell v. New Gloucester*, 70 Me. 305 (1879).

Massachusetts. *Stockwell v. Fitchburg*, 110 Mass. 305 (1872); *Stone v. Attleborough*, 140 Mass. 328 (1885), (4 N. E. Rep. 570); *Richardson v. Boston*, 156 Mass. 145 (1892), (30 N. E. Rep. 478).

Michigan. *Harris v. Clinton Township*, 64 Mich. 447 (1887), (31 N. W. Rep. 425).

Minnesota. *St. Paul v. Kuby*, 8 Minn. 154 (1863).

Nebraska. *South Omaha v. Cunningham*, 31 Neb. 316 (1891), (47 N. W. Rep. 930).

New Hampshire. *Willey v. Portsmouth*, 35 N. H. 303, 314 (1857); *Davis v. Hill*, 41 N. H. 329 (1860).

New York. *Maxim v. Champion*, 50 Hun, 88 (1888), affirmed, 119 N. Y. 626 (1890), (23 N. E. Rep. 1144); *Ivory v. Deerpark*, 116 N. Y. 476 (1889), (22 N. E. Rep. 1080).

North Carolina. *Bunch v. Edenton*, 90 N. C. 431 (1884).

Pennsylvania. *Lower Macungie Township v. Merkhoffer*, 71 Pa. St.

bound, therefore, to put up a railing in order to prevent travellers from straying, either purposely or accidentally, out of the highway, even though there may be a dangerous place at some distance from the travelled part which may be reached by straying;¹ nor in order to prevent children from playing upon adjacent areas.² Nor, again, in order to prevent frightened animals from escaping from the highway;³ and it has been held that the fact that the near location of a railroad might make such an occurrence probable would not alter this rule.⁴ And a municipality is under no obligation to anticipate and

276 (1872); *Hey v. Philadelphia*, 81 Pa. St. 44 (1876); *Plymouth Township v. Graver*, 125 Pa. St. 24 (1889), (17 Atl. Rep. 249); *Trexler v. Greenwich Township*, 168 Pa. St. 214 (1895), (31 Atl. Rep. 1090).

Rhode Island. *Chapman v. Cook*, 10 R. I. 304 (1872).

Tennessee. *Niblett v. Nashville*, 12 Heisk. 684 (1874).

Vermont. *Drew v. Sutton*, 55 Vt. 586 (1882).

Wisconsin. *Green v. Bridge Creek*, 38 Wis. 449 (1875); *Prideaux v. Mineral Point*, 43 Wis. 513 (1878).

¹ *Illinois.* *Monmouth v. Sullivan*, 8 Ill. App. 50 (1880).

Maine. *Morgan v. Hallowell*, 57 Me. 375 (1869); *Willey v. Ellsworth*, 64 Me. 57, 62 (1874).

Massachusetts. *Sparhawk v. Salem*, 1 Allen, 30 (1861); *Puffer v. Orange*, 122 Mass. 389 (1877).

Minnesota. *McHugh v. St. Paul*, 67 Minn. 441, 443 (1897), (70 N. W. Rep. 5).

New York. *Monk v. New Utrecht*, 104 N. Y. 552, 556 (1887), (11 N. E. Rep. 268).

Ohio. *Kelley v. Columbus*, 41 Oh. St. 263 (1884).

Rhode Island. *Chapman v. Cook*, 10 R. I. 304 (1872).

Wisconsin. *Green v. Bridge Creek*, 38 Wis. 449 (1875).

² *Talty v. Atlantic*, 92 Ia. 135 (1894), (60 N. W. Rep. 516); *Clark v. Richmond*, 83 Va. 355, 359 (1887), (5 S. E. Rep. 369).

³ *Bureau Junction v. Loug*, 56 Ill. App. 458 (1894); *Moss v. Burlington*, 60 Ia. 438 (1883), (15 N. W. Rep. 267); *Adams v. Natick*, 13 Allen (Mass.), 429 (1866). But see *Tallahassee v. Fortune*, 3 Fla. 19, 26 (1850).

⁴ *Adams v. Natick*, 13 Allen (Mass.), 429 (1866).

guard against by railings ordinary dangers that are likely to arise, such as the formation of ice upon adjacent land which was not otherwise dangerous, but which with the ice upon it was a danger to persons who strayed on to it.¹ As was said in the Massachusetts case of *Damon v. Boston*:¹ "The danger which requires a railing must be of an unusual character, such as bridges, declivities, excavations, steep banks, or deep water. Spaces adjoining roads, streets, and sidewalks, and unsuitable for travel, are often left open in both country and city; and a town or city is not bound to fence against them, unless their condition is such as to expose travellers to unusual hazard."

§ 115. **The Test of the Necessity of a Railing.** — While it may be very difficult, perhaps impossible, to define by any general proposition the exact extent of the obligation of municipal corporations to erect railings along their highways, there is a practical test that may aid materially in the determination of any particular case. That practical test is whether there is a dangerous object or place so near to the line of travel as to make the use of the highway itself unsafe in the absence of a railing. If there is such an object or place so located, the municipality is bound to maintain sufficient guards to protect travellers from the danger incident to it. There appears to be no difference of opinion as to this rule.²

¹ *Damon v. Boston*, 149 Mass. 147 (1889), (21 N. E. Rep. 235).

² *Connecticut*. *Beardsley v. Hartford*, 50 Conn. 529 (1883).

Massachusetts. *Coggswell v. Lexington*, 4 Cush. 307 (1849); *Hayden v. Attleborough*, 7 Gray, 338 (1856); *Sparhawk v. Salem*, 1 Allen, 30 (1861); *Alger v. Lowell*, 3 Allen, 402 (1862); *Adams v. Natick*, 13 Allen, 429 (1866); *Murphy v. Gloucester*, 105 Mass. 470, 472 (1870); *Marshall v. Ipswich*, 110 Mass. 522 (1872); *Purple v. Greenfield*, 138 Mass. 1 (1884); *Logan v. New Bedford*, 157 Mass. 534 (1893), (32

It becomes thus ordinarily a question of fact for the jury to determine how near to the highway a dangerous place must be in order to render the want of a railing a culpable defect.¹ But if, in view of the evidence most

N. E. Rep. 910); *Tisdale v. Bridgewater*, 167 Mass. 248 (1897), (45 N. E. Rep. 730).

Missouri. *Bassett v. St. Joseph*, 53 Mo. 290 (1873).

New Hampshire. *Stack v. Portsmouth*, 52 N. H. 221 (1872).

New York. *Ivory v. Deerpark*, 116 N. Y. 476 (1889), (22 N. E. Rep. 1080).

North Carolina. *Bunch v. Edenton*, 90 N. C. 431 (1884).

Tennessee. *Niblett v. Nashville*, 12 Heisk. 684 (1873).

Virginia. *Clark v. Richmond*, 83 Va. 355 (1887), (5 S. E. Rep. 369).

West Virginia. *Biggs v. Huntington*, 32 W. Va. 55, 64 (1889), (9 S. E. Rep. 51).

In *Clark v. Richmond*, 83 Va. 355, 358 (1887), (5 S. E. Rep. 369), the court qualifies this doctrine by saying: "In order to render the corporation liable for injuries occasioned by such excavation, the excavation must substantially adjoin the highway, so that one making a false step, or affected by sudden giddiness, might be thrown into the excavation. But if, in order to reach the place of danger, the party injured must become an intruder or trespasser upon the premises of another, the case will be different, for in such case there is no breach of duty from which the liability to respond in damages can result."

¹ *Georgia.* *Atlanta v. Wilson*, 59 Ga. 544 (1887).

Iowa. *Manderschid v. Dubuque*, 29 Ia. 73 (1870).

Maine. *Morse v. Belfast*, 77 Me. 44 (1885).

Massachusetts. *Barnes v. Chicopee*, 138 Mass. 67 (1884).

Michigan. *Malloy v. Walker Township*, 77 Mich. 448 (1889), (43 N. W. Rep. 1012).

Nebraska. *South Omaha v. Cunningham*, 31 Neb. 316 (1891), (47 N. W. Rep. 930).

New Hampshire. *Woodman v. Nottingham*, 49 N. H. 387 (1870).

New York. *Ivory v. Deerpark*, 116 N. Y. 476 (1889), (22 N. E. Rep. 1080); *Burns v. Yonkers*, 83 Hun, 211 (1894), (31 N. Y. Supp. 757).

Pennsylvania. *Burrell Township v. Uncapher*, 117 Pa. St. 353 (1887), (11 Atl. Rep. 619); *Ewing v. North Versailles Township*, 146 Pa. St. 309 (1892), (28 Atl. Rep. 338); *Wellman v. Susquehanna Depot*, 167 Pa. St. 239 (1895), (31 Atl. Rep. 566).

Vermont. *Drew v. Sutton*, 55 Vt. 586 (1882).

favorable to the plaintiff, the danger is so slight that it would be unreasonable to require the corporation to provide a railing, the court may decide the question as a matter of law.¹

In order to determine whether a dangerous place is in such close proximity to the highway as to render travelling upon it unsafe, that proximity is to be considered with reference to the highway as travelled and as used for public travel, rather than as located.²

But while the proximity of some dangerous object or place is the "essential and invariable element" in all cases where a railing is required, the circumstances surrounding the particular locality in question must also be taken into consideration. Thus, the character of the intervening ground, the risk of coming upon the dangerous object or place, the degree of danger incurred if one does come upon it, and like practical questions, are all involved in the issue.³

¹ *Scannal v. Cambridge*, 163 Mass. 91, 93 (1895), (39 N. E. Rep. 790); *Seymer v. Lake*, 66 Wis. 651 (1886), (29 N. W. Rep. 554).

In Massachusetts it has been held as a matter of law that a dangerous place was too remote from the travelled path to make the absence of a railing a defect in the highway where it was thirty-four feet distant, *Barnes v. Chicopee*, 138 Mass. 67 (1884); where it was twenty-five feet distant, *Murphy v. Gloucester*, 105 Mass. 470 (1870); *Hudson v. Marlborough*, 154 Mass. 218 (1891), (28 N. E. Rep. 147); where it was twenty to thirty feet distant, *Puffer v. Orange*, 122 Mass. 389 (1877); *Daily v. Worcester*, 131 Mass. 452 (1881); where it was seventeen feet distant, *Scannal v. Cambridge*, 163 Mass. 91, 93 (1895), (39 N. E. Rep. 790). But where the dangerous place was twelve feet distant from the travelled path, it was held that it could not be said as a matter of law that the risk was so small as to make it unreasonable to require the town to provide a railing. *Tisdale v. Bridgewater*, 167 Mass. 248 (1897), (45 N. E. Rep. 730).

² *Warner v. Holyoke*, 112 Mass. 362 (1873); *Barnes v. Chicopee*, 138 Mass. 67 (1884); *Hannibal v. Campbell*, 86 Fed. Rep. 297 (1898); and see *Ivory v. Deerpark*, 116 N. Y. 476 (1889), (22 N. E. Rep. 1080).

³ See *Adams v. Natick*, 13 Allen (Mass.), 429 (1866).

§ 116. The Kind of Railing required. — Municipal corporations are ordinarily bound to anticipate and provide for the usual demands of travel upon their highways. In the matter of railings, therefore, they are bound simply to provide such a kind as is suitable for the ordinary exigencies of travel upon the particular road at the particular place.¹

The question of the sufficiency of the railing provided by the municipal authorities is usually one of fact for the jury to decide upon all the evidence;² but it may be determined by the court as a matter of law where the facts are clear and undisputed.³

§ 117. Barriers erected to guard an Excavation or to close a Highway. — Travellers upon the public ways, in the absence of anything to the contrary, have a right to assume that a way which appears to be open and used for public travel has not been discontinued nor rendered dangerous by reason of the existence of unguarded excavations. If, therefore, municipal corporations make, or allow to be made, such excavations within a highway, they are bound to erect such barriers or other safeguards as will render travel upon the rest of the highway reasonably safe.⁴

¹ *Lyman v. Amherst*, 107 Mass. 339, 346 (1871); *Lineburg v. St. Paul*, 71 Minn. 245 (1898), (73 N. W. Rep. 723).

² *Lyman v. Amherst*, 107 Mass. 339 (1871); *St. Paul v. Knby*, 8 Minn. 154, 159 (1863).

³ *Tarras v. Winona*, 71 Minn. 22 (1897), (73 N. W. Rep. 505); *Glasier v. Hebron*, 131 N. Y. 447 (1892), (30 N. E. Rep. 239).

⁴ *Georgia. Savannah v. Waldner*, 49 Ga. 316 (1873).

Illinois. Chicago v. Gallagher, 44 Ill. 295 (1867); *Aurora v. Rockabrand*, 149 Ill. 399 (1894), (36 N. E. Rep. 1004); *Canton v. Dewey*, 71 Ill. App. 346 (1897).

Indiana. Alexandria v. Young, 20 Ind. App. 672 (1898), (51 N. E. Rep. 109).

Iowa. Crystal v. Des Moines, 65 Ia. 502 (1885), (22 N. W. Rep. 646); *Hall v. Manson*, 99 Ia. 698 (1896), (68 N. W. Rep. 922).

And if they close a public way, either temporarily or permanently, they must show, in order to escape liability to a person injured while using, or attempting to use, such way, that it was in fact closed by suitable and sufficient barriers.¹

Kansas. Wyandotte *v.* Gibson, 25 Kan. 236 (1881).

Maine. Kimball *v.* Bath, 38 Me. 219 (1854); Butler *v.* Bangor, 67 Me. 385 (1877).

Massachusetts. Myers *v.* Springfield, 112 Mass. 489 (1873).

Michigan. Wakeham *v.* St. Clair Township, 91 Mich. 15 (1892), (51 N. W. Rep. 696); O'Rourke *v.* Monroe, 98 Mich. 520, 522 (1894), (57 N. W. Rep. 738).

Minnesota. O'Leary *v.* Mankato, 21 Minn. 65 (1874).

Missouri. McCarroll *v.* Kansas City, 64 Mo. App. 283 (1895).

Nebraska. Lincoln *v.* Calvert, 39 Neb. 305 (1894), (58 N. W. Rep. 115).

New York. Storrs *v.* Utica, 17 N. Y. 104 (1858); Brusso *v.* Buffalo, 90 N. Y. 679 (1882); Bryant *v.* Randolph, 133 N. Y. 70 (1892), (30 N. E. Rep. 657).

Oregon. McAllister *v.* Albany, 18 Oreg. 426 (1890), (23 Pac. Rep. 845).

Tennessee. Memphis *v.* Lasser, 9 Humph. 757 (1849).

Utah. Naylor *v.* Salt Lake City, 9 Utah, 491 (1894), (35 Pac. Rep. 509).

Virginia. Norfolk *v.* Johnakin, 94 Va. 285 (1897), (26 S. E. Rep. 830).

Washington. Sutton *v.* Snohomish, 11 Wash. 24 (1895), (39 Pac. Rep. 273).

West Virginia. Wilson *v.* Wheeling, 19 W. Va. 323, 347 (1882).

Wisconsin. Milwaukee *v.* Davis, 6 Wis. 377 (1857); Klatt *v.* Milwaukee, 53 Wis. 196 (1881), (10 N. W. Rep. 162); Hart *v.* Red Cedar, 63 Wis. 634 (1885), (24 N. W. Rep. 410).

¹ *Connecticut.* Munson *v.* Derby, 37 Conn. 298 (1870).

Maine. Phillips *v.* Veazie, 40 Me. 96 (1855).

Massachusetts. White *v.* Boston, 122 Mass. 491 (1877).

Michigan. Southwell *v.* Detroit, 74 Mich. 438 (1889), (42 N. W. Rep. 118).

Missouri. Stephens *v.* Macon, 83 Mo. 345 (1884).

Wisconsin. Wiltse *v.* Tilden, 77 Wis. 152 (1890), (46 N. W. Rep. 234); Schuenke *v.* Pine River, 84 Wis. 669 (1893), (54 N. W. Rep. 1007); Bills *v.* Kaukauna, 94 Wis. 310 (1896), (68 N. W. Rep. 992).

If a municipality has performed its full duty in this regard by building a proper barricade, it will not be liable to a person injured in consequence of such excavation, or while travelling upon such discontinued road, even if the barriers were afterwards removed by third persons or by some accident, unless it further appears that it knew, or, under the circumstances of the particular case, ought to have known, of such removal.¹

§ 118. The Erection of Barriers to protect Travellers entering the Highway from Private Ways. — There is no positive rule of law requiring persons to enter a highway in any particular manner or at any fixed place. Hence it is not material, so far as the duty of municipal corporations to keep their public ways reasonably safe for travel is concerned, whether they enter and are lawfully upon the highway by passing over private or public ways. The weight of authority, therefore, favors the rule that if there is a private way leading into a public way, over

¹ *Indiana.* Dooley *v.* Sullivan, 112 Ind. 451 (1887), (14 N. E. Rep. 566).

Iowa. Theissen *v.* Belle Plaine, 81 Ia. 118 (1890), (46 N. W. Rep. 854).

Massachusetts. Doherty *v.* Waltham, 4 Gray, 596 (1855); Myers *v.* Springfield, 112 Mass. 489 (1873).

Michigan. Welsh *v.* Lansing, 111 Mich. 589 (1897), (70 N. W. Rep. 129).

Missouri. Myers *v.* Kansas City, 108 Mo. 480, 487 (1891), (18 S. W. Rep. 914).

New York. Sevestre *v.* Mayor, etc. of New York, 47 N. Y. Sup. Ct. 341 (1881).

Vermont. Mullen *v.* Rutland, 55 Vt. 77 (1883).

Washington. Sutton *v.* Snohomish, 11 Wash. 24 (1895), (39 Pac. Rep. 273).

Wisconsin. Klatt *v.* Milwaukee, 53 Wis. 196 (1881), (10 N. W. Rep. 162).

United States. District of Columbia *v.* Woodbury, 136 U. S. 450, 465 (1890), (10 S. Ct. Rep. 990).

which there is known to be much travel, and if a traveller entering the street laterally from such private way would, while using due care, be exposed to the danger of an injury in consequence of the existence of an excavation or other defect within the highway, the municipality is as much bound to erect barriers or to provide other safeguards to protect such travellers so entering the street, as to guard those who come toward the defective spot in the direct line of travel.¹

§ 119. **The Kind of Barriers required.** — When erecting barriers, it is the duty of municipal corporations to make them of such height, strength, and materials as to render the highway reasonably safe against all those exigencies of travel which, in the course of the ordinary use of the particular way, might fairly be foreseen and provided for. They need not make them sufficient for extraordinary contingencies.²

Whether the barriers erected by the corporation are suitable and sufficient under the circumstances to protect

¹ *Burnham v. Boston*, 10 Allen (Mass.), 290 (1865); *Orme v. Richmond*, 79 Va. 86 (1884). But see *Goodin v. Des Moines*, 55 Ia. 67 (1880), (7 N. W. Rep. 411).

² *Morton v. Frankfort*, 55 Me. 46 (1867); *Welsh v. Lansing*, 111 Mich. 589 (1897), (70 N. W. Rep. 129); *Stacy v. Phelps*, 47 Hun (N. Y.), 54 (1888); *Bills v. Kaukauna*, 94 Wis. 310 (1896), (68 N. W. Rep. 992).

In *Weirs v. Jones County*, 86 Ia. 625 (1892), (53 N. W. Rep. 321), it appeared that sign boards bearing the words "bridge unsafe" were placed at each end of the structure. The court held that if they were placed in a conspicuous position and were of such a construction as would give a warning to a person in the exercise of ordinary care, they were sufficient; and that a person who attempted to cross the bridge would be chargeable with contributory negligence, even though he could not read the English language, in which the inscription was written.

For a case where a barrier made of barbed wire was held to be unsuitable and dangerous, see *Bills v. Kaukauna*, 94 Wis. 310, 314 (1896), (68 N. W. Rep. 992).

the traveller from the danger is usually a question for the jury to decide.¹ And the determination of the question generally involves several considerations, such as the situation of the highway; the modes commonly adopted for guarding such dangerous places; the traveller's knowledge of such modes; and similar facts.²

§ 120. Lights. — The obligation resting upon municipal corporations is to keep their public ways reasonably safe for ordinary travel not only during the daytime but also in the night-time. Hence if a way, rendered dangerous by excavations or obstructions, cannot be made reasonably safe for travel at night simply by the erection of barriers, ordinary care requires the municipality to keep sufficient lights burning to properly warn travellers of the danger.³ And the fact that an electric light upon the street happens to be located near-by does not necessarily relieve it from this duty.⁴

¹ *Sterling v. Thomas*, 60 Ill. 264 (1871); *Howard v. Mendon*, 117 Mass. 585 (1875); *Norwood v. Somerville*, 159 Mass. 105 (1893), (33 N. E. Rep. 1108); *Sutton v. Snohomish*, 11 Wash. 24, 32 (1895), (39 Pac. Rep. 273); *District of Columbia v. Woodbury*, 136 U. S. 450, 465 (1890).

² See *White v. Boston*, 122 Mass. 491 (1877).

³ *Indianapolis v. Scott*, 72 Ind. 196, 202 (1880); *O'Rourke v. Monroe*, 98 Mich. 520, 522 (1894), (57 N. W. Rep. 738); *Canavan v. Oil City*, 183 Pa. St. 611, 616 (1898), (38 Atl. Rep. 1096).

⁴ *Aurora v. Rockabrand*, 149 Ill. 399, 402 (1894), (36 N. E. Rep. 1004); *Naylor v. Salt Lake City*, 9 Utah, 491 (1894), (35 Pac. Rep. 509).

In the above Illinois case, Mr. Justice Wilkin says, at page 402: "It will not do to say that an electric light upon a street, however bright, can always take the place of danger signals, where temporary obstructions are placed upon the street. The object of a danger signal is to direct the attention to a particular object, and warn those approaching, of something unusual. The electric light may enable those passing over the streets to see their way, and avoid others, and things generally found on the street, but they give no special warning whatever, and, as is well known from experience, are often deceptive and bewildering."

Whenever lights are required as a warning, they must be of such a character, and provided with sufficient oil, so that they may remain lighted during the occasion for their use.¹

H. NOTICE OF THE DEFECT.

§ 121. When Notice of the Defect must be shown. — The liability of municipal corporations relative to highways, as has been pointed out, rests solely upon negligence. But before negligence can be predicated of them, they must be in a position to act. No mere failure to remedy defects of the existence of which they have no notice, either actual or constructive, can be negligence. Hence when a liability for injuries occasioned by a defect in the highway that was caused by the action of persons for whose acts the municipality is not responsible, or by the action of the elements, or by a pure accident, is sought to be enforced, the injured person must show that it actually had notice, or, by the exercise of reasonable care and diligence, might have had notice, of the defective condition in time either to have remedied it before the accident happened, or at least to have taken such steps as would prevent the injury. In all such cases, unless notice, either actual or constructive, is shown, the corporation is not liable in a private action.²

¹ *Baker v. Grand Rapids*, 111 Mich. 447, 449 (1897), (69 N. W. Rep. 740).

“Ordinary care does not require that a watch be kept during the night over an excavation, unless there are circumstances peculiar to the particular case making it necessary.” *Dooley v. Sullivan*, 112 Ind. 451, 452 (1887), (14 N. E. Rep. 566).

² *Alabama*. *Montgomery v. Wright*, 72 Ala. 411, 420 (1882).

Colorado. *Boulder v. Niles*, 9 Col. 415 (1886), (12 Pac. Rep.

Whether or not the defendant corporation in any particular case had notice of the defect that caused the injury is usually a question of fact for the jury to determine.¹

632); Cunningham v. Denver, 23 Col. 18, 21 (1896), (45 Pac. Rep. 356).

Connecticut. Cummings v. Hartford, 70 Conn. 115, 123 (1897), (38 Atl. Rep. 916).

Delaware. Seward v. Wilmington, 2 Marv. 189, 202 (1896), (42 Atl. Rep. 451).

District of Columbia. District of Columbia v. Payne, 13 App. Cas. 500 (1899).

Georgia. Augusta v. Hafers, 61 Ga. 48 (1878); Montezuma v. Wilson, 82 Ga. 206, 209 (1888), (9 S. E. Rep. 17).

Illinois. Fahey v. Harvard, 62 Ill. 28 (1871); Chatsworth v. Ward, 10 Ill. App. 75 (1881); Mansfield v. Moore, 124 Ill. 133, 138 (1888), (16 N. E. Rep. 246).

Indiana. Ft. Wayne v. De Witt, 47 Ind. 391 (1874); Dooley v. Sullivan, 112 Ind. 451 (1887), (14 N. E. Rep. 566); Warsaw v. Dunlap, 112 Ind. 576 (1887), (11 N. E. Rep. 623); Evansville v. Senhenn, 151 Ind. 42, 58 (1898), (47 N. E. Rep. 634).

Iowa. Jones v. Clinton, 100 Ia. 333 (1896), (69 N. W. Rep. 418).

Kansas. Jansen v. Atchison, 16 Kan. 358 (1876); McFarland v. Emporia Township, 59 Kan. 568 (1898), (53 Pac. Rep. 864).

Maine. Bartlett v. Kittery, 68 Me. 358 (1878); Farrell v. Oldtown, 69 Me. 72 (1879).

Massachusetts. Hanscom v. Boston, 141 Mass. 242 (1886), (5 N. E. Rep. 249); Blake v. Lowell, 143 Mass. 296 (1887), (9 N. E. Rep. 627); Stanton v. Salem, 145 Mass. 476 (1888), (14 N. E. Rep. 519); Welsh v. Amesbury, 170 Mass. 437 (1898), (49 N. E. Rep. 735).

Michigan. Dewey v. Detroit, 15 Mich. 307 (1867); Woodbury v. Owosso, 64 Mich. 239, 248 (1887), (31 N. W. Rep. 130); Wakeham v. St. Clair Township, 91 Mich. 15 (1892), (51 N. W. Rep. 696).

Minnesota. Pottner v. Minneapolis, 41 Minn. 73 (1889), (42 N. W. Rep. 784).

Missouri. Schweickhardt v. St. Louis, 2 Mo. App. 571, 579 (1876); Bonine v. Richmond, 75 Mo. 437, 439 (1882).

Nebraska. Davis v. Omaha, 47 Neb. 836 (1896), (66 N. W. Rep. 859).

New Hampshire. Johnson v. Haverhill, 35 N. H. 74 (1857); Lambert v. Pembroke, 66 N. H. 280 (1890), (23 Atl. Rep. 81).

New York. Griffin v. Mayor, etc. of New York, 9 N. Y. 456

¹ Decatur v. Besten, 169 Ill. 340 (1897), (48 N. E. Rep. 186); Klein v. Dallas, 71 Tex. 280, 285 (1888), (8 S. W. Rep. 90); and see cases cited above.

§ 122. When Notice of the Defect need not be shown.—Municipal corporations, like natural persons, are considered to be chargeable with knowledge of their own acts, and of those ordered by them. Therefore, whenever defective conditions in a highway are due to the direct act of a municipality itself, or of persons whose acts are constructively its own, no notice, either actual or constructive, need be shown.¹ And in such cases notice is

(1853); *Rehberg v. Same*, 91 N. Y. 137, 142 (1883); *Turner v. Newburgh*, 109 N. Y. 301 (1888), (16 N. E. Rep. 344); *Harrington v. Buffalo*, 121 N. Y. 147 (1890), (24 N. E. Rep. 186).

North Carolina. *Jones v. Greensboro*, 124 N. C. 310, 312 (1899), (32 S. E. Rep. 675).

Ohio. *Shelby v. Claggett*, 46 Oh. St. 549 (1889), (22 N. E. Rep. 407).

Oregon. *Mack v. Salem*, 6 Oreg. 275 (1877); *Ford v. Umatilla County*, 15 Oreg. 313 (1887), (16 Pac. Rep. 33).

Pennsylvania. *Rapho Township v. Moore*, 68 Pa. St. 404, 408 (1871); *Burns v. Bradford*, 137 Pa. St. 361, 367 (1890), (20 Atl. Rep. 997); *Fitzpatrick v. Darby*, 184 Pa. St. 645 (1898), (39 Atl. Rep. 545).

Tennessee. *Knoxville v. Bell*, 12 Lea, 157, 160 (1883).

Texas. *Austin v. Ritz*, 72 Tex. 391 (1888), (9 S. W. Rep. 884); *Galveston v. Smith*, 80 Tex. 69 (1891), (15 S. W. Rep. 589).

Vermont. *Priudle v. Fletcher*, 39 Vt. 255 (1867); *Ozier v. Hinesburgh*, 44 Vt. 220 (1872); *Campbell v. Fair Haven*, 54 Vt. 336, 340 (1882).

Virginia. *Noble v. Richmond*, 31 Gratt. 271, 281 (1879).

Wisconsin. *Ward v. Jefferson*, 24 Wis. 342 (1869); *Goodnough v. Oshkosh*, 24 Wis. 549 (1869); *Bailey v. Spring Lake*, 61 Wis. 227 (1884), (20 N. W. Rep. 920).

United States. *Mayor, etc. of New York v. Sheffield*, 4 Wall., 189, 195 (1866); *District of Columbia v. Woodbury*, 136 U. S. 450, 463 (1890), (10 S. Ct. Rep. 990).

¹ *Connecticut.* *Boucher v. New Haven*, 40 Conn. 456, 460 (1873).

Colorado. *Denver v. Aaron*, 6 Col. App. 232 (1895).

Georgia. *Brunswick v. Braxton*, 70 Ga. 193 (1883).

Illinois. *Alexander v. Mt. Sterling*, 71 Ill. 366 (1874); *Jefferson v. Chapman*, 127 Ill. 438 (1889), (20 N. E. Rep. 33).

Indiana. *Wabash County v. Pearson*, 120 Ind. 426, 428 (1889) (22

not an essential element, even though one may be required by some statutory¹ or charter² provision.

§ 123. Whether Notice must be shown where the Defect is created by a Licensee. — There is some conflict of opinion to be found among the authorities upon the question whether notice must be shown in cases where the defect is created by persons acting under a license granted by

N. E. Rep. 134); *Fort Wayne v. Patterson*, 3 Ind. App. 34, 38 (1891), (29 N. E. Rep. 167).

Iowa. *Barnes v. Newton*, 46 Ia. 567 (1877); *Stein v. Council Bluffs*, 72 Ia. 180 (1887), (33 N. W. Rep. 455).

Maine. *Holmes v. Paris*, 75 Me. 559 (1884); *Buck v. Biddeford*, 82 Me. 433, 437 (1890), (19 Atl. Rep. 912).

Massachusetts. *Brooks v. Somerville*, 106 Mass. 271 (1871).

Michigan. *Baker v. Grand Rapids*, 111 Mich. 447 (1897), (69 N. W. Rep. 740).

Missouri. *Barr v. Kansas City*, 105 Mo. 550, 557 (1891), (16 S. W. Rep. 483).

Nebraska. *Lincoln v. Calvert*, 39 Neb. 305, 309 (1894), (58 N. W. Rep. 115).

New York. *Brusso v. Buffalo*, 90 N. Y. 679 (1882); *Wilson v. Troy*, 135 N. Y. 96 (1892), (32 N. E. Rep. 44).

North Dakota. *Ludlow v. Fargo*, 3 N. Dak. 485 (1893), (57 N. W. Rep. 506).

Tennessee. *Poole v. Jackson*, 93 Tenn. 62, 69 (1893), (23 S. W. Rep. 57).

Texas. *Klein v. Dallas*, 71 Tex. 280, 285 (1888), (8 S. W. Rep. 90); *Ringelstein v. San Antonio*, 21 S. W. Rep. 634 (1893).

Wisconsin. *Moore v. Platteville*, 78 Wis. 644 (1891), (47 N. W. Rep. 1055).

¹ *Holmes v. Paris*, 75 Me. 559 (1884); *Buck v. Biddeford*, 82 Me. 433 (1890), (19 Atl. Rep. 912).

² *Houston v. Isaacks*, 68 Tex. 116 (1887), (3 S. W. Rep. 693); and see *Springfield v. Le Claire*, 49 Ill. 476 (1869).

In West Virginia, under the statute, no notice need be shown. *Sheff v. Huntington*, 16 W. Va. 307, 312 (1880); *Chapman v. Milton*, 31 W. Va. 384 (1888), (7 S. E. Rep. 22); *Evans v. Huntington*, 37 W. Va. 601 (1893), (16 S. E. Rep. 801). And this was formerly the rule in Massachusetts, under an early statute, where a defect had existed over twenty-four hours. *Billings v. Worcester*, 102 Mass. 329 333 (1867).

the defendant corporation. A majority, however, of the courts that have considered the question favor a negative view, and hold that where defective conditions in a highway are due to acts done by third persons, with the express sanction of the municipality, no notice is necessary in order to fix its liability, on the theory that the acts of a person so authorized are in effect the acts of the corporation itself of which it must be presumed to have knowledge.¹

§ 124. Notice to whom.—The notice to the corporation of the existence of a defect in its highways, which the law contemplates, is a notice to those of its officers who are charged by municipal ordinance or by some charter or statutory provision with the duty of maintaining and repairing its public ways generally, or at least the particular way where the defect existed.² It has been held

¹ *Georgia.* *Savannah v. Donnelly*, 71 Ga. 258 (1883).

Kansas. *Abilene v. Cowperthwait*, 52 Kan. 324 (1892), (34 Pac. Rep. 795).

Minnesota. *Cleveland v. St. Paul*, 18 Minn. 279 (1872).

Missouri. *Stephens v. Macon*, 83 Mo. 345, 357 (1884); *Taubman v. Lexington*, 25 Mo. App. 218, 224 (1887); *Haniford v. Kansas City*, 103 Mo. 172, 181 (1890), (15 S. W. Rep. 753).

Contra: *Warsaw v. Dunlap*, 112 Ind. 576 (1887), (11 N. E. Rep. 623); *Dorlon v. Brooklyn*, 46 Barb. (N. Y.) 604 (1866); *Denver v. Sherret*, 88 Fed. Rep. 226 (1898).

² *Georgia.* *Columbus v. Ogletree*, 96 Ga. 177 (1895), (22 S. E. Rep. 709).

Iowa. *Smith v. Des Moines*, 84 Ia. 685 (1892), (51 N. W. Rep. 77); *Smith v. Pella*, 86 Ia. 236 (1892), (53 N. W. Rep. 226).

Pennsylvania. *Platz v. McKean Township*, 178 Pa. St. 601 (1897), (36 Atl. Rep. 136).

Rhode Island. *Jordan v. Peckham*, 19 R. I. 28 (1895), (31 Atl. Rep. 305).

Tennessee. *Poole v. Jackson*, 93 Tenn. 62 (1893), (23 S. W. Rep. 57).

Texas. *Austin v. Colgate*, 27 S. W. Rep. 896 (1894).

Virginia. *Lynchburg v. Wallace*, 95 Va. 640 (1898), (29 S. E. Rep. 675).

Wisconsin. *Jaquish v. Ithaca*, 36 Wis. 108, 111 (1874).

accordingly that notice to the following officers was notice to the corporation: Mayor of the city;¹ President of the village;² City Council;³ a member of the Council;⁴ County Supervisor;⁵ Town Supervisor;⁶ Highway officials, such as Superintendent, Commissioner, Overseer or Surveyor of Streets;⁷ City Marshal;⁸ Chief of Police;⁹ Superintendent of Public Works.¹⁰

¹ *Salina v. Trosper*, 27 Kan. 544, 560 (1882); *Michigan City v. Ballance*, 123 Ind. 334 (1889), (24 N. E. Rep. 117).

² *Edwards v. Three Rivers*, 96 Mich. 625, 627 (1893), (55 N. W. Rep. 1003).

³ *Aurora v. Hillman*, 90 Ill. 61, 64 (1878).

⁴ *Illinois. Sorento v. Johnson*, 52 Ill. App. 659 (1893).

Indiana. *Logansport v. Justice*, 74 Ind. 378, 380 (1881); *Columbus v. Strassner*, 124 Ind. 482, 489 (1890), (25 N. E. Rep. 65).

Iowa. *Carter v. Monticello*, 68 Ia. 178 (1885), (26 N. W. Rep. 129); *Owen v. Fort Dodge*, 98 Ia. 281, 289 (1896), (67 N. W. Rep. 281); *Keyes v. Cedar Falls*, 107 Ia. 509, 512 (1899), (78 N. W. Rep. 227).

Michigan. *Dundas v. Lansing*, 75 Mich. 499, 504 (1889), (42 N. W. Rep. 1011); *Fuller v. Jackson*, 82 Mich. 480, 484 (1890), (46 N. W. Rep. 721); *McKormick v. West Bay City*, 110 Mich. 265 (1896), (68 N. W. Rep. 148).

Wisconsin. *McKeigue v. Janesville*, 68 Wis. 50, 57 (1887), (31 N. W. Rep. 298).

Contra: *Peach v. Utica*, 10 Hun (N. Y.), 477, 481 (1877); *McDermott v. Kingston*, 19 Hun (N. Y.), 198 (1879). And see also *Jordan v. Peckham*, 19 R. I. 28 (1895), (31 Atl. Rep. 305).

⁵ *Morgan v. Fremont County*, 92 Ia. 644 (1894), (61 N. W. Rep. 231).

⁶ *Jaquish v. Ithaca*, 36 Wis. 108, 111 (1874); *Little v. Iron River*, 102 Wis. 250 (1899), (78 N. W. Rep. 416).

⁷ *Alabama.* *Bradford v. Anniston*, 92 Ala. 349, 350 (1890), (8 So. Rep. 683).

Illinois. *Joliet v. McCraney*, 49 Ill. App. 381 (1893).

Indiana. *Lafayette v. Larson*, 73 Ind. 367, 372 (1881).

Iowa. *Ledgerwood v. Webster City*, 93 Ia. 726 (1895), (61 N. W. Rep. 1089).

Michigan. *Moore v. Kenockee Township*, 75 Mich. 332, 342 (1889),

⁸ *Hayes v. West Bay City*, 91 Mich. 418 (1892), (51 N. W. Rep. 1067).

⁹ *Denver v. Dean*, 10 Col. 375, 377 (1887), (16 Pac. Rep. 30).

¹⁰ *Michels v. Syracuse*, 92 Hun (N. Y.), 365, 368 (1898), (36 N. Y. Supp. 507).

It appears to be now well settled that notice to policemen is notice to the corporation only when it is a part of their duties to look after, and to report upon, the condition of the highways. Since they are primarily peace officers, it will not ordinarily be presumed that they are especially charged with any duties respecting the streets. If as a matter of fact such duties do devolve upon them, it should be made affirmatively to appear;¹ and if it does so appear, then notice to them will be regarded as notice to the corporation.²

On the other hand, it has been held that notice is not brought home to the corporation by showing notice to (42 N.W. Rep. 944); *Fuller v. Jackson*, 82 Mich. 480 (1890), (46 N.W. Rep. 721).

Nebraska. *Lincoln v. Woodward*, 19 Neb. 259 (1886), (27 N.W. Rep. 110).

New York. *Shook v. Cohoes*, 108 N.Y. 648 (1888), (15 N.E. Rep. 531); *McSherry v. Canandaigua*, 129 N.Y. 612 (1892), (29 N.E. Rep. 821).

Pennsylvania. *Platz v. McKean Township*, 178 Pa. St. 601 (1897), (36 Atl. Rep. 136).

Rhode Island. *Seamons v. Fitts*, 20 R.I. 443, 445 (1898), (40 Atl. Rep. 3).

Washington. *Saylor v. Montesano*, 11 Wash. 328, 332 (1895), (39 Pac. Rep. 653).

Wisconsin. *Parish v. Eden*, 62 Wis. 272, 282 (1885), (22 N.W. Rep. 399); *Bloor v. Delafield*, 69 Wis. 273, 277 (1887), (34 N.W. Rep. 115).

¹ *Columbus v. Ogletree*, 96 Ga. 177 (1895), (22 S.E. Rep. 709); *Reid v. Chicago*, 83 Ill. App. 554 (1899); *Cason v. Ottumwa*, 102 Ia. 99, 104 (1897), (71 N.W. Rep. 192).

² *Connecticut.* *Cummings v. Hartford*, 70 Conn. 115 (1898), (38 Atl. Rep. 916).

Georgia. *Columbus v. Ogletree*, 102 Ga. 293 (1897), (29 S.E. Rep. 749).

Missouri. *Carrington v. St. Louis*, 89 Mo. 208, 213 (1886), (1 S.W. Rep. 240).

New York. *Rehberg v. Mayor, etc. of New York*, 91 N.Y. 137 (1883); *Twogood v. Same*, 102 N.Y. 216 (1886), (6 N.E. Rep. 275); *Farley v. Same*, 152 N.Y. 222, 226 (1897), (46 N.E. Rep. 506).

other officers than those upon whom the duty to care for the public ways rests;¹ nor by showing notice to one of its employees,² unless that employee is charged with the duty to repair the highways;³ nor by showing notice to one or more of its inhabitants.⁴

Provided notice is brought home to a proper officer, it makes no difference that he is not an officer *de jure*: it is enough to charge the corporation that he is an officer *de facto*.⁵ But notice to a person before his election to office has been held not to be notice to the corporation.⁶

§ 125. Actual Notice. — Actual notice of a defect in the highway is simply knowledge on the part of the proper officers of the corporation, acquired either by personal observation or by communication from third persons, of that condition of things which is alleged to constitute the defect.⁷ Whether or not those officers, knowing the con-

¹ *Austin v. Colgate*, 27 S. W. Rep. 896 (Tex., 1894).

² *Rich v. Rockland*, 87 Me. 188 (1895), (32 Atl. Rep. 872); *Foster v. Boston*, 127 Mass. 290 (1879).

³ *Atlanta v. Buchannan*, 76 Ga. 585, 588 (1886); *Garmany v. Gainesville*, 41 S. W. Rep. 730 (Tex., 1897).

⁴ *Bill v. Norwich*, 39 Conn. 222 (1872); *Cramer v. Burlington*, 39 Ia. 512, 515 (1874); *Donaldson v. Boston*, 16 Gray (Mass.), 508 (1860).

In Maine the rule was formerly *contra*. *Springer v. Bowdoinham*, 7 Me. 442 (1831); *Tuell v. Paris*, 23 Me. 556 (1844); *Mason v. Ellsworth*, 32 Me. 271 (1850); but this was changed under a later statute, *Rogers v. Shirley*, 74 Me. 144 (1878).

⁵ *Pease v. Parsonsfield*, 92 Me. 345 (1898), (42 Atl. Rep. 502); *McSherry v. Canandaigua*, 129 N. Y. 612 (1892), (29 N. E. Rep. 821).

⁶ *Lohr v. Philipsburg Borough*, 156 Pa. St. 246 (1893), (27 Atl. Rep. 133).

In *Bunker v. Gouldsboro*, 81 Me. 188, 195 (1889), (16 Atl. Rep. 543), it was held that notice to a person after his appointment as, but before he could legally become, surveyor of highways, was not notice to the defendant town.

⁷ *Smith v. Pella*, 86 Ia. 236, 241 (1892), (53 N. W. Rep. 226); *Poole v. Jackson*, 93 Tenn. 62, 68 (1893), (23 S. W. Rep. 57); *Parish v. Eden*, 62 Wis. 272, 283 (1885), (22 N. W. Rep. 399).

ditions, thought them to constitute a defect or considered them to be dangerous, is not material.¹

But when the alleged defect consists of a thing rightfully in the highway, such for instance as a boiler that is being transported along the road, it must appear not only that the municipal officers knew that the thing was there, but also that they knew it was there unnecessarily.² This is obvious when it is considered that the notice which the law contemplates is notice of a defect, and that such an object does not constitute a defect in the highway merely by being there, but only by being there an unreasonable time.

§ 126. Constructive Notice — The Facts from which it may be inferred. — The theory of the law is that lack of notice on the part of a municipal corporation of the existence of a defect in the highway, under circumstances where it reasonably ought to have it, is equivalent to actual notice, so far as fixing its liability to a person injured by such defect is concerned.³ The line of argu-

¹ *Murphysboro v. O'Riley*, 36 Ill. App. 157, 160 (1890); *Hinckley v. Somerset*, 145 Mass. 326, 336 (1887), (14 N. E. Rep. 166); *Brown v. Swanton*, 69 Vt. 53 (1896), (37 Atl. Rep. 280). But see *Joliet v. Walker*, 7 Ill. App. 267, 271 (1880).

² *Bartlett v. Kittery*, 68 Me. 358 (1878); *Farrell v. Oldtown*, 69 Me. 72 (1879); *Davis v. Corry City*, 154 Pa. St. 598 (1893), (26 Atl. Rep. 621); *Cairncross v. Pewaukee*, 86 Wis. 181 (1893), (56 N. W. Rep. 648).

In *Rogers v. Orion*, 116 Mich. 324 (1898), (74 N. W. Rep. 463), it was held that express notice to the proper officer that there was a defect in the highway, without indicating the place where it was to be found, was not notice to charge the defendant corporation.

³ *Connecticut*. *Manchester v. Hartford*, 30 Conn. 118, 121 (1861). *Illinois*. *Streator v. Chrisman*, 182 Ill. 215 (1899), (54 N. E. Rep. 997).

Iowa. *Rowell v. Williams*, 29 Ia. 210, 215 (1870).

Kansas. *Kansas City v. Birmingham*, 45 Kan. 212, 215 (1891), (25 Pac. Rep. 569).

Massachusetts. *Bourget v. Cambridge*, 159 Mass. 388 (1893), (34 N. E. Rep. 455).

Michigan. *Dotton v. Albion*, 50 Mich. 129, 132 (1883), (15 N. W.

ment upon which this doctrine is supported is that the municipal officers charged with the duty relative to highways are bound to exercise reasonable care and diligence in order to make them safe for travel in the ordinary modes. The proper discharge of this duty necessarily involves the exercise of due vigilance to discover their condition. If, then, defects exist in them under such circumstances that those officers could not help knowing the fact, if they had performed this duty, — if they did not know it because they failed to exercise proper vigilance, — notice should be imputed to them. That is, under such circumstances they must be regarded, in contemplation of law, as having notice. And this is constructive notice, — that notice which the law imputes from the circumstances of the case.

The chief circumstances connected with the existence of a defect in the highway, from which notice to the corporation may be imputed, relate to the length of time prior to the accident during which it has existed; to the degree of its exposure to ordinary observation; to its

Rep. 46); *Campbell v. Kalamazoo*, 80 Mich. 655, 661 (1890), (45 N. W. Rep. 652).

Minnesota. *Cleveland v. St. Paul*, 18 Minn. 279, 287 (1872); *Lindholm v. St. Paul*, 19 Min. 245, 249 (1872).

Mississippi. *Whitfield v. Meridian*, 66 Miss. 570 (1889), (6 So. Rep. 244).

Nebraska. *Lincoln v. Smith*, 28 Neb. 762, 772 (1890), (45 N. W. Rep. 41).

New Hampshire. *Howe v. Plainfield*, 41 N. H. 135 (1860).

New York. *Hover v. Barkhoof*, 44 N. Y. 113 (1870); *Todd v. Troy*, 61 N. Y. 506, 509 (1875); *Kunz v. Troy*, 104 N. Y. 344, 349 (1887), (10 N. E. Rep. 442); *Pomfrey v. Saratoga Springs*, 104 N. Y. 459, 465 (1887), (11 N. E. Rep. 43); *McVee v. Watertown*, 92 Hun, 306, 310 (1895), (36 N. Y. Supp. 870).

Virginia. *Noble v. Richmond*, 31 Gratt. 271, 281 (1879).

Washington. *Sutton v. Snohomish*, 11 Wash. 24, 29 (1895), (39 Pac. Rep. 273).

situation with reference to the amount of travel over or near it and the extent of the nearby population.¹

The invariable and most essential of those circumstances is the time during which the defect has been in existence.² And yet it is not possible to fix, as a matter

¹ See *Noyes v. Gardner*, 147 Mass. 505, 508 (1888), (18 N. E. Rep. 423); *Klein v. Dallas*, 71 Tex. 280 (1888), (8 S. W. Rep. 90); *Klatt v. Milwaukee*, 53 Wis. 196, 206 (1881), (10 N. W. Rep. 162).

² *Connecticut*. *Bill v. Norwich*, 39 Conn. 222, 228 (1872).

Delaware. *Pierce v. Wilmington*, 2 Marv. 306, 309 (1897), (43 Atl. Rep. 162).

Georgia. *Atlanta v. Perdue*, 53 Ga. 607 (1875); *Griffin v. Johnson*, 84 Ga. 279, 282 (1889), (10 S. E. Rep. 719).

Illinois. *Chicago v. Major*, 18 Ill. 349, 360 (1857); *Hogan v. Chicago*, 168 Ill. 551, 557 (1897), (48 N. E. Rep. 210); *Joliet v. Johnson*, 177 Ill. 178, 182 (1898), (52 N. E. Rep. 498).

Indiana. *Indianapolis v. Scott*, 72 Ind. 196 (1880); *Spiceland v. Alier*, 98 Ind. 467 (1884); *Michigan City v. Boeckling*, 122 Ind. 39, 42 (1889), (23 N. E. Rep. 518); *Frankfort v. Coleman*, 19 Ind. App. 368, 373 (1897), (49 N. E. Rep. 474).

Iowa. *Rice v. Des Moines*, 40 Ia. 638, 641 (1875).

Massachusetts. *Olson v. Worcester*, 142 Mass. 536 (1886), (8 N. E. Rep. 441).

Michigan. *Alberts v. Vernon*, 96 Mich. 549, 551 (1898), (55 N. W. Rep. 1022); *Handy v. Meridian Township*, 114 Mich. 454, 457 (1897), (72 N. W. Rep. 251).

Minnesota. *Cleveland v. St. Paul*, 18 Minn. 279, 287 (1872); *Gude v. Mankato*, 30 Minn. 256 (1883), (15 N. W. Rep. 175).

Missouri. *Shipley v. Bolivar*, 42 Mo. App. 401 (1890).

Nebraska. *Lincoln v. Woodward*, 19 Neb. 259, 262 (1886), (27 N. W. Rep. 110).

New Hampshire. *Howe v. Plainfield*, 41 N. H. 135 (1860).

New York. *Saulsbury v. Ithaca*, 94 N. Y. 27 (1883).

Pennsylvania. *McLaughlin v. Corry*, 77 Pa. St. 109 (1874).

Utah. *Naylor v. Salt Lake City*, 9 Utah, 491, 496 (1894), (35 Pac. Rep. 509).

Virginia. *Moore v. Richmond*, 85 Va. 538, 542 (1888), (8 S. E. Rep. 387).

Washington. *Sutton v. Snohomish*, 11 Wash. 24, 29 (1895), (39 Pac. Rep. 273).

Wisconsin. *Goodno v. Oshkosh*, 28 Wis. 300 (1871); *Cooper v. Milwaukee*, 97 Wis. 458, 464 (1897), (72 N. W. Rep. 1180).

of law, any precise time which would be sufficient in every case to warrant imputing notice to the corporation. The law makes no presumption upon the subject, but simply leaves to the jury to determine, in each particular case, whether or not sufficient time had elapsed so that the proper municipal authorities might, in the exercise of due diligence, have had notice.¹ It has been held, however, that notice was properly imputed to the corporation where the defect had existed for one year or more before the accident happened;² where it had existed between a month and a year;³ where it had existed between a week

¹ *Chicago v. McCulloch*, 10 Ill. App. 459, 465 (1881); *Decatur v. Besten*, 169 Ill. 340 (1897), (48 N. E. Rep. 186); *Colley v. Westbrook*, 57 Me. 181, 183 (1869); *Maus v. Springfield*, 101 Mo. 613 (1890), (14 S. W. Rep. 630); *District of Columbia v. Woodbury*, 136 U. S. 450, 463 (1890), (10 S. Ct. Rep. 990).

² *Kentucky*. *Newport v. Miller*, 93 Ky. 22 (1892), (18 S. W. Rep. 835).

Massachusetts. *Lyman v. Hampshire County*, 140 Mass. 311 (1885), (3 N. E. Rep. 211).

New York. *Goodfellow v. Mayor, etc. of New York*, 100 N. Y. 15 (1885), (2 N. E. Rep. 462); *Rankert v. Junius*, 25 N. Y. App. Div. 470 (1898), (49 N. Y. Supp. 850).

Wisconsin. *Barstow v. Berlin*, 34 Wis. 357 (1874).

³ *Connecticut*. *Davis v. Guilford*, 55 Conn. 351 (1887), (11 Atl. Rep. 350).

Delaware. *Robinson v. Wilmington*, 8 Houst. 409 (1889), (32 Atl. Rep. 347).

Illinois. *Chicago v. Crooker*, 2 Ill. App. 279 (1878).

Indiana. *Indianapolis v. Murphy*, 91 Ind. 382 (1883).

Iowa. *Jones v. Clinton*, 100 Ia. 333, 336 (1896), (69 N. W. Rep. 418).

Massachusetts. *Purple v. Greenfield*, 138 Mass. 1 (1884).

Michigan. *Tice v. Bay City*, 84 Mich. 461 (1889), (47 N. W. Rep. 1062).

Minnesota. *Moore v. Minneapolis*, 19 Minn. 300 (1872).

Missouri. *Market v. St. Louis*, 56 Mo. 189 (1874); *Maus v. Springfield*, 101 Mo. 613, 617 (1890), (14 S. W. Rep. 630).

New York. *Pettengill v. Yonkers*, 116 N. Y. 558 (1889), (22 N. E. Rep. 1095).

Wisconsin. *Schuenke v. Pine River*, 84 Wis. 669, 677 (1893), (54 N. W. Rep. 1007).

and a month;¹ and where it had existed longer than a day but less than a week.² But it has been held also that notice ought not to be imputed to the corporation where the defective condition had been in existence for one day or less.³

¹ *Georgia.* Dempsey v. Rome, 94 Ga. 420 (1894), (20 S. E. Rep. 335).

Illinois. Bloomington v. Annett, 16 Ill. App. 199 (1884).

Iowa. Ronn v. Des Moines, 78 Ia. 63 (1889), (42 N. W. Rep. 582); Baxter v. Cedar Rapids, 103 Ia. 599, 603 (1897), (72 N. W. Rep. 790).

Massachusetts. Fortin v. Easthampton, 145 Mass. 196 (1887), (13 N. E. Rep. 599).

Minnesota. L'Herault v. Minneapolis, 69 Minn. 261 (1897), (72 N. W. Rep. 73).

New York. Smid v. Mayor, etc. of New York, 49 N. Y. Sup. Ct. 126 (1883); Foels v. Tonawanda, 75 Hun, 363 (1894), (27 N. Y. Supp. 113).

Texas. Palestine v. Hassell, 15 Tex. Civ. App. 519 (1897), (40 S. W. Rep. 147).

² *Chicago v. Hoy*, 75 Ill. 530 (1874); *Salina v. Trosper*, 27 Kan. 544 (1882); *Weed v. Ballston Spa*, 76 N. Y. 329 (1879).

³ *Georgia.* Jackson v. Boone, 93 Ga. 662 (1894), (20 S. E. Rep. 46).

Iowa. Sikes v. Manchester, 59 Ia. 65, 69 (1882), (12 N. W. Rep. 755); Theissen v. Belle Plaine, 81 Ia. 118 (1890), (46 N. W. Rep. 854).

Massachusetts. Stoddard v. Winchester, 154 Mass. 149 (1891), (27 N. E. Rep. 1014).

Michigan. Dittrich v. Detroit, 98 Mich. 245, 248 (1893), (57 N. W. Rep. 125).

Mississippi. Butler v. Oxford, 69 Miss. 618, 622 (1891), (13 So. Rep. 626).

New York. Dorn v. Oyster Bay, 84 Hun, 510, 513 (1895), (32 N. W. Supp. 341).

Rhode Island. Carroll v. Allen, 20 R. I. 541 (1898), (40 Atl. Rep. 419).

Wisconsin. Klatt v. Milwaukee, 53 Wis. 196, 205 (1889), (10 N. W. Rep. 162).

And see also Carrington v. St. Louis, 89 Mo. 208, 213 (1886), (1 S. W. Rep. 240); Parsons v. Manchester, 67 N. H. 163 (1891), (27 Atl. Rep. 88), in which it was held that the question of notice should go to the jury, although the defect had existed less than a day.

Where a defect is not continuous in point of time, but consists of repeated acts of the same general character, as the repeated leaving open of the door to a cellar-way by an abutting property owner, or the repeated leaving of merchandise upon the sidewalk by the occupant of an adjoining building, such acts extending over a considerable period of time and being known to the corporate authorities, it has been held

The circumstance of the exposure of the defect to observation ranks next in importance to that of time. It is pretty generally agreed that where the defect is latent, so that it cannot be discovered by the exercise of due diligence on the part of the proper municipal officers, notice will not be imputed to the corporation.¹ But there that notice might be presumed. *Chapman v. Macon*, 55 Ga. 566 (1876); *McGaffigan v. Boston*, 149 Mass. 289 (1889), (21 N. E. Rep. 371); *Davis v. Corry City*, 154 Pa. St. 598 (1893), (26 Atl. Rep. 621).

¹ *Massachusetts*. *Stoddard v. Winchester*, 154 Mass. 149 (1891), (27 N. E. Rep. 1014).

Michigan. *Wakeham v. St. Clair Township*, 91 Mich. 15, 26 (1892), (51 N. W. Rep. 696).

North Carolina. *Jones v. Greensboro*, 124 N. C. 310, 313 (1899), (32 S. E. Rep. 675).

Pennsylvania. *Fitzpatrick v. Darby*, 184 Pa. St. 645 (1898), (39 Atl. Rep. 545).

Tennessee. *Jackson v. Pool*, 91 Tenn. 448 (1892), (19 S. W. Rep. 324).

Texas. *Klein v. Dallas*, 71 Tex. 280 (1888), (8 S. W. Rep. 90); *Dixon v. San Antonio*, 30 S. W. Rep. 359 (1895).

Vermont. *Prindle v. Fletcher*, 39 Vt. 255 (1867); *Brown v. Mount Holly*, 69 Vt. 364, 367 (1897), (38 Atl. Rep. 69).

Wisconsin. *Cooper v. Milwaukee*, 97 Wis. 458 (1897), (72 N. W. Rep. 1130).

Municipal corporations are, however, chargeable with a knowledge of the natural tendency of wooden sidewalks to decay, since "this tendency is the result of natural causes, whose operation is so constant, familiar, and common as to be known to everybody." Hence it is held to be so far negligence for the corporate officers to fail to take notice of, and to act upon, such knowledge, that no other notice of a defect in a sidewalk arising from natural decay need be shown. See

Colorado. *Denver v. Dean*, 10 Col. 375, 378 (1887), (16 Pac. Rep. 30), *semble*.

District of Columbia. *Sherwood v. District of Columbia*, 3 Mackey, 276 (1884).

Illinois. *Joliet v. McCraney*, 49 Ill. App. 381, 383 (1893).

Indiana. *Indianapolis v. Scott*, 72 Ind. 196 (1880).

Iowa. *Weber v. Creston*, 75 Ia. 16, 18 (1888), (39 N. W. Rep. 126).

Minnesota. *Furnell v. St. Paul*, 20 Minn. 117, 123 (1873).

Mississippi. *Nesbitt v. Greenville*, 69 Miss. 22, 29 (1891), (10 So. Rep. 452).

New Hampshire. *Lambert v. Pembroke*, 66 N. H. 280 (1890), (23 Atl. Rep. 81).

But see *Hembling v. Grand Rapids*, 99 Mich. 292 (1894), (58 N. W.

is some difference of opinion to be found among the authorities upon the question how notorious the defect must be in order to warrant attributing notice to the corporation after the lapse of a sufficient time. The decided weight of authority favors the rule that the defective condition of the highway must be so open to observation that passers-by will notice it. That is, no greater diligence in the matter of observation is to be exacted from the officers of the corporation than is required of travellers.¹ This rule, however, does not, it has been held, mean that every passer-by shall actually notice the defect, but simply that it should be sufficiently open so that "they might have noticed it if they had consciously seen it."²

In a few cases it has been pertinently observed that the fact that the defect was not of a character necessarily to attract the attention of passers-by was not proof that the proper municipal officers, by the exercise of reasonable vigilance, could not have discovered it, for the degree of Rep. 310); *Jackson v. Pool*, 91 Tenn. 448 (1892), (19 S. W. Rep. 324); *Lohr v. Philipsburg Borough*, 156 Pa. St. 246 (1893), (27 Atl. Rep. 133).

¹ *Alabama.* *Albrittin v. Huntsville*, 60 Ala. 486 (1877).

Iowa. *Doulon v. Clinton*, 33 Ia. 397, 399 (1871); *Broburg v. Des Moines*, 63 Ia. 523 (1884), (19 N. W. Rep. 340).

Michigan. *Tice v. Bay City*, 84 Mich. 461, 465 (1891), (47 N. W. Rep. 1062); *McGrail v. Kalamazoo*, 94 Mich. 52 (1892), (53 N. W. Rep. 955).

Mississippi. *Whitfield v. Meridian*, 66 Miss. 570, 576 (1889), (6 So. Rep. 244).

New York. *Requa v. Rochester*, 45 N. Y. 129 (1871); *Riley v. Eastchester*, 18 N. Y. App. Div. 94, 96 (1897), (45 N. Y. Supp. 448).

Pennsylvania. *Otto Township v. Wolf*, 106 Pa. St. 608, 610 (1884); *Burns v. Bradford*, 137 Pa. St. 361 (1890), (20 Atl. Rep. 997).

Tennessee. *Poole v. Jackson*, 93 Tenn. 62, 68 (1893), (23 S. W. Rep. 57).

Washington. *Elster v. Seattle*, 18 Wash. 304 (1897), (51 Pac. Rep. 394).

² *Rosevere v. Osceola Mills*, 169 Pa. St. 555, 563 (1895), (32 Atl. Rep. 548).

care to be exercised by the latter was not the same as that to be expected of the former.¹

The circumstance, however, that the particular defect which caused the injury is not so notorious as to attract general attention is not conclusive of the question of notice in all cases. Even though such defect was not apparent to ordinary observation, yet notice of it may be imputed to the corporation from the fact that for a considerable time prior to the accident the highway at, and near, the place at which the injury was received was in a generally bad condition, or that there were particular defects in the highway in the immediate vicinity. In such cases the law imputes notice to the corporation on the theory that the fact of its neglect of the duty to repair, under circumstances where its performance would have led to knowledge of the particular defect, is enough to charge it with notice thereof.² But in order to warrant

¹ *Looney v. Joliet*, 49 Ill. App. 621, 626 (1893); *Squires v. Chillicothe*, 89 Mo. 226, 231 (1886), (1 S. W. Rep. 23).

² *Illinois*. *Brownlee v. Alexis*, 39 Ill. App. 135, 143 (1890).

Iowa. *Ruggles v. Nevada*, 63 Ia. 185 (1884), (18 N. W. Rep. 866), *semble*; *Aryman v. Marshalltown*, 90 Ia. 350 (1894), (57 N. W. Rep. 867); *Faulk v. Iowa County*, 108 Ia. 442, 447 (1897), (72 N. W. Rep. 757).

Massachusetts. *Noyes v. Gardner*, 147 Mass. 505 (1888), (18 N. E. Rep. 423).

Michigan. *Campbell v. Kalamazoo*, 80 Mich. 655, 659 (1890), (45 N. W. Rep. 652), distinguishing *Dundas v. Lansing*, 75 Mich. 499 (1889), (42 N. W. Rep. 1011); *O'Neil v. West Branch*, 81 Mich. 544, 546 (1890), (45 N. W. Rep. 1023); *Moore v. Kalamazoo*, 109 Mich. 176, 177, (1896), (66 N. W. Rep. 1089).

Minnesota. *Gude v. Mankato*, 30 Minn. 256 (1883), (15 N. W. Rep. 175); *Lyons v. Red Wing*, 76 Minn. 20 (1899), (78 N. W. Rep. 868).

Nebraska. *Plattsmouth v. Mitchell*, 20 Neb. 228, 230 (1886), (29 N. W. Rep. 593).

North Dakota. *Chacey v. Fargo*, 5 N. Dak. 173, 177 (1895), (64 N. W. Rep. 932).

Wisconsin. *Weisenberg v. Appleton*, 26 Wis. 56, 58 (1870); *Shaw*

imputing to the corporation notice of a particular defect from the continued existence of a condition of general disrepair, or of nearby particular defects, the former should be either of the same general character as the latter, or so related that the former is a usual concomitant of the latter.¹

The fact, however, that there have been previous defects

v. Sun Prairie, 74 Wis. 105, 108 (1889), (42 N. W. Rep. 271); *Barrett v. Hammond*, 87 Wis. 654, 658 (1894), (58 N. W. Rep. 1053).

United States. *Osborne v. Detroit*, 32 Fed. Rep. 36, 39 (1886).

"There should be reasonable discretion exercised," says Mr. Justice Brown in *Osborne v. Detroit*, 32 Fed. Rep. 36 (1886), at page 39, "in admitting evidence of the condition of the walk near the accident, but we think, in any case, if it be so near the place of accident that a person examining the walk, or responsible for the condition of the walk in that neighborhood, would be likely also to notice the defect at the spot where the accident occurred, it would be competent."

In *Will v. Mendon*, 108 Mich. 251, 254 (1896), (66 N. W. Rep. 58), it was held that evidence of the generally defective condition of a walk for a distance of four or five rods in either direction from the place of the accident was competent for the purpose of charging the corporation with notice. On the other hand, in *Ruggles v. Nevada*, 63 Ia. 185 (1884), (18 N. W. Rep. 866), the court held that evidence of the general disrepair of the walk twenty-five feet distant from the defect that caused the injury was not competent to charge the defendant with notice of the particular defect.

¹ *Fuller v. Jackson*, 82 Mich. 480, 484 (1890), (46 N. W. Rep. 721); *Shelby v. Clagett*, 46 Oh. St. 549, 554 (1889), (22 N. E. Rep. 407); *Barrett v. Hammond*, 87 Wis. 654, 658 (1894), (58 N. W. Rep. 1053).

"If, however, the general defect known to the village was not of a character to make the sidewalk unsafe, or was of a character totally unlike that which caused the injury, so that the existence of one afforded no presumption of the existence of the other, there is no sound principle which requires notice of one to constitute, as a matter of law, notice of the other. Even if there was such relation between them that one would frequently be found in connection with the other, yet it is not the province of the law to declare that proof of one is proof of the other. This is only done where the connection is universal, or so close that the law will not permit it to be denied." *Shelby v. Clagett*, 46 Oh. St. 549, 555 (1889), (22 N. E. Rep. 407).

in the same place which were known to, and had been repaired by, the corporation, is not competent as a basis for imputing to it notice of another defect of the same general character existing at the same place but at a later time.¹

The last circumstance of special importance in the matter of constructive notice relates to the extent of the use of the highway on which the defect is located. While reasonable vigilance is required in the maintenance of every highway without regard to the amount of travel, what is reasonable vigilance in any particular case depends in large measure upon the extent of the use to which the way is put. What, therefore, might be negligence in not knowing of a dangerous condition in a public way in one locality in a city, might not be negligence if such condition was in another locality in the same city. In other words, if the defect was on a street where there was but little travel and where the population was light, reasonable vigilance would require less care and watchfulness to discover it than if it was situated on a street

¹ *Carter v. Monticello*, 68 Ia. 178 (1885), (26 N. W. Rep. 129); *Donaldson v. Boston*, 16 Gray (Mass.), 508 (1860).

In *Wiltse v. Tilden*, 77 Wis. 152 (1890), (46 N. W. Rep. 234), a charge to the jury to the effect that if the dangerous condition of the highway at the time of the accident might reasonably have been anticipated by the town authorities, in view of previous known defects therein and of the nature of the creek, it was their duty to have closed up the road until it was repaired, or to have provided means for warning travellers of the danger, was held not to be erroneous.

If a corporation attempts to repair a walk, but does not do it in such a manner as to render the same safe and in good repair, it is chargeable with notice of the defects left in it. "If the authorities, having both actual and constructive notice of the defective condition of the walk before the repairs were made, so made the repairs that the walk was left in unsafe condition and repair, because of the defective material therein, they would be liable for injury resulting from such defect." *Wheaton v. Hadley*, 131 Ill. 640, 645 (1890), (23 N. E. Rep. 422).

where travel was continuous and the population dense. Hence, since constructive notice is always predicated upon a neglect of the duty to repair, it is obvious that it cannot properly be imputed to a corporation, where the alleged defect is on a comparatively unfrequented highway, until after the lapse of a longer time than would be required if the travel over it was more constant.¹

¹ *Illinois.* Decatur v. Besten, 169 Ill. 340 (1897), (48 N. E. Rep. 186), *semble*.

Massachusetts. Noyes v. Gardner, 147 Mass. 505, 508 (1888), (18 N. E. Rep. 423); Welsh v. Amesbury, 170 Mass. 437, 440 (1898), (49 N. E. Rep. 735).

Minnesota. Moore v. Minneapolis, 19 Minn. 300 (1872); L'Herault v. Minneapolis, 69 Minn. 261, 263 (1897), (72 N. W. Rep. 73).

Missouri. Carrington v. St. Louis, 89 Mo. 208, 213 (1886), (1 S. W. Rep. 240).

New Hampshire. Parsons v. Manchester, 67 N. H. 163 (1891), (27 Atl. Rep. 88).

New York. Lane v. Hancock, 142 N. Y. 510, 519 (1894), (37 N. E. Rep. 473).

Pennsylvania. Fritsch v. Allegheny, 91 Pa. St. 226, 229 (1879).

Rhode Island. Carroll v. Allen, 20 R. I. 541 (1898), (40 Atl. Rep. 419).

Texas. Klein v. Dallas, 71 Tex. 280 (1888), (8 S. W. Rep. 90).

Wisconsin. Hall v. Fond du Lac, 42 Wis. 274 (1877).

In Massachusetts it has been held that evidence as to causes that may be known to be in operation in, or near to, the highway, which are likely to produce a defect therein, may be competent as a basis for imputing to the corporation notice of the defect when it comes into existence, since in such a case greater vigilance may be required of the municipal officers than under other conditions. "It is reasonable that the officers should keep a more watchful eye over such a way in order to guard against danger. When, therefore, a defect is produced by some known, permanent cause which would naturally create the defect, the existence of such cause may properly be considered by the jury in determining whether the officers of the town or city might have had notice of the defect by the exercise of proper care and diligence." Chief Justice Morton, in Olson v. Worcester, 142 Mass. 536 (1886), (8 N. E. Rep. 441); Post v. Boston, 141 Mass. 189 (1886), (4 N. E. Rep. 815), *accord*. This rule, however, is limited in its application to cases where the danger to be guarded against is reasonably immanent

As is apparent, doubtless, from what has been already said, the question whether or not, in any particular case, the defendant corporation had constructive notice of the defect that caused the injury is commonly one of fact to be decided by the jury upon a due consideration of all the evidence relating to the above-mentioned circumstances, and to any other circumstances relevant to the subject.¹

in point of time. If the known causes are likely to produce a defect in the highway only at some time in the remote future, the imputation of notice to the municipality will not be warranted. *Rochefort v. Attleborough*, 154 Mass. 140 (1891), (27 N. E. Rep. 1013); *Stoddard v. Winchester*, 154 Mass. 149 (1891), (27 N. E. Rep. 1014); s. c. 157 Mass. 567 (1893), (32 N. E. Rep. 948). See also *Fleming v. Springfield*, 154 Mass. 520 (1891), (28 N. E. Rep. 910); *Wiltse v. Tilden*, 77 Wis. 152 (1890), (46 N. W. Rep. 234).

¹ *Colorado.* *Boulder v. Niles*, 9 Col. 415 (1886), (12 Pac. Rep. 632).

District of Columbia. *District of Columbia v. Payne*, 13 App. Cas. 500 (1899).

Illinois. *Joliet v. Walker*, 7 Ill. App. 267, 271 (1880); *Chicago v. McCulloch*, 10 Ill. App. 459, 464 (1881); *Decatur v. Besten*, 169 Ill. 340 (1897), (48 N. E. Rep. 186).

Indiana. *Washington v. Small*, 86 Ind. 462, 471 (1882); *Indianapolis v. Murphy*, 91 Ind. 382 (1883).

Maine. *Bradbury v. Falmouth*, 18 Me. 64 (1841).

Massachusetts. *Purple v. Greenfield*, 138 Mass. 1 (1884).

Michigan. *Dotton v. Albion*, 50 Mich. 129 (1883), (15 N. W. Rep. 46).

New Hampshire. *Lambert v. Pembroke*, 66 N. H. 280 (1890), (23 Atl. Rep. 81).

New York. *Roach v. Ogdensburg*, 91 Hun, 9 (1895), (36 N. Y. Supp. 112).

Pennsylvania. *Otto Township v. Wolf*, 106 Pa. St. 608 (1884).

Texas. *Klein v. Dallas*, 71 Tex. 280 (1888), (8 S. W. Rep. 90).

Washington. *Sproul v. Seattle*, 17 Wash. 256, 259 (1897), (49 Pac. Rep. 489).

Wisconsin. *Sheel v. Appleton*, 49 Wis. 125, 128 (1880), (5 N. W. Rep. 27).

In *McCabe v. Hammond*, 34 Wis. 590 (1874), the defect consisted of snowdrifts. The court said, at page 592: "The proper overseer

I. CONTRIBUTORY NEGLIGENCE.

§ 127. The Application of the Doctrine of Contributory Negligence. — The familiar common law doctrine of contributory negligence applies to actions against municipal corporations to recover damages for injuries suffered by reason of a defect in the highway, whether the right to maintain such action is based upon common law principles or upon some statutory provision. If, therefore, the plaintiff was guilty of negligent conduct at the time of the accident,¹ and such negligence contributed to his injury, he cannot maintain his action, even though the highway was out of repair and that want of repair also

was chargeable with notice that the effect of the storm was to produce drifts in the highway in his road district. He knew the violence of the wind, and the quantity of snow which fell during the continuance of the storm, and, by the exercise of a very little judgment, he might have formed a correct opinion of the effects which would naturally follow those causes; and it was his manifest duty to ascertain where the highways were obstructed by the snow, and to take steps to remove the drifts."

But in *Gurney v. Rockport*, 93 Me. 360 (1899), (45 Atl. Rep. 310), it was held that knowledge of a heavy fall of snow which drifts the highways of a town generally, but blows off in spots, is not actual notice of a particular drift within the meaning of the statutory provision which requires that a town must have twenty-four hours' actual notice of a defect before it can be held liable for injuries arising therefrom.

¹ "At the time of the accident" means both before and after its commencement. A plaintiff cannot in the exercise of due care "abandon herself to needless alarm or give up all proper control of the horse, in consequence of the peril to which she was exposed by the negligence of the defendants in omitting to keep their road in suitable repair. She was still bound to use such care as a person of ordinary prudence and discretion would exercise if placed in similar circumstances and exposed to a like danger, making due allowance for the alarm into which she and her companion were thrown by the occurrence of the accident." Chief Justice Bigelow in *Brooks v. Petersham*, 16 Gray (Mass.), 181, 184 (1860).

contributed to his injury.¹ This is so, of course, not because it was his own conduct that contributed to his injury, but because it was conduct to which some fault could be imputed that concurred in bringing about the accident. If, therefore, the plaintiff's contributing act was entirely innocent, it will not destroy his right to recover damages.²

The standard of care required of a traveller upon the public highways is simply the conduct of an ordinarily intelligent and prudent man under like circumstances.³

This standard is invariable. While it is true that greater care is required of a traveller in some cases than in others, the variance is in the circumstances, not in the

¹ *Georgia.* *Massey v. Columbus*, 75 Ga. 658 (1885).

Illinois. *Chicago v. Babcock*, 143 Ill. 358, 363 (1892), (32 N. E. Rep. 271).

Maine. *Merrill v. Hampden*, 26 Me. 234, 240 (1846); *Morse v. Belfast*, 77 Me. 44, 46 (1885).

Massachusetts. *Thompson v. Bridgewater*, 7 Pick. 188 (1828); and see Williams, *Statutory Torts in Massachusetts*, page 6, note 3, where the Massachusetts cases on this point are collected.

Michigan. *Wakeham v. St. Clair Township*, 91 Mich. 15 (1892), (51 N. W. Rep. 696).

New Hampshire. *Sleeper v. Sandown*, 52 N. H. 244 (1872).

New York. *Dubois v. Kingston*, 102 N. Y. 219 (1886), (6 N. E. Rep. 273); *Sutphen v. North Hempstead*, 80 Hun, 409, 412 (1894), (30 N. Y. Supp. 128).

Texas. *Austin v. Ritz*, 72 Tex. 391, 401 (1888), (9 S. W. Rep. 884).

Vermont. *Kelsey v. Glover*, 15 Vt. 708 (1843).

Virginia. *Richmond v. Courtney*, 32 Gratt. 792 (1880); *Moore v. Richmond*, 85 Va. 538, 544 (1888), (8 S. E. Rep. 387).

Wisconsin. *Griffin v. Willow*, 43 Wis. 509, 512 (1878); *Doan v. Willow Springs*, 101 Wis. 112, 116 (1898), (76 N. W. Rep. 1104).

² *Wyandotte v. White*, 13 Kan. 191 (1874); *Lund v. Tyngsboro*, 11 Cush. (Mass.) 563 (1853); *Pomeroy v. Westfield*, 154 Mass. 462 (1891), (28 N. E. Rep. 899).

³ *Lane v. Crombie*, 12 Pick. (Mass.) 177 (1831), as treated in *Palmer v. Andover*, 2 Cush. (Mass.) 600, 605 (1849); *McGuinness v. Worcester*, 160 Mass. 272 (1894), (35 N. E. Rep. 1068); *Easton v. Neff*, 102 Pa. St. 474 (1883); *Austin v. Ritz*, 72 Tex. 391, 402 (1888), (9 S. W. Rep. 884).

standard of care. This standard requires, of course, that he shall use reasonable prudence both in the manner of his going and as to the condition of his equipment. Hence if he is injured while driving, he cannot maintain his action against the corporation if he was guilty of contributory negligence either in the manner of his driving or in using an improper vehicle, horse, or harness: a defect in any one of those details, due to his negligence, which contributes to the injury will as effectually bar a recovery as carelessness in his management of the team.¹

The views of the courts of the various states are not uniform relative to the question upon which party rests the burden of showing the facts as to the care or want of care of the injured person. A majority in number of them, and the United States courts as well, hold that this burden is entirely upon the defendant, and that, therefore, unless the state of facts averred by him in his declaration, or proved by him at the trial, necessarily shows him to have been guilty of contributory negligence, the plaintiff can make out a *prima facie* case without any proof as to the care exercised by him. In other states, the rule prevails that the plaintiff must show, by affirmative evidence, that he was at the time of the accident in the exercise of due care.²

If, upon a due consideration of all the facts and circumstances bearing upon the issue and of the inferences that may legitimately be drawn from them, different minds

¹ *Murdock v. Warwick*, 4 Gray (Mass.), 178, 180 (1855); *Brackenridge v. Fitchburg*, 145 Mass. 160 (1887), (13 N. E. Rep. 457); *Horrigan v. Clarksbnrg*, 150 Mass. 218 (1889), (22 N. E. Rep. 897); *Tucker v. Henniker*, 41 N. H. 317 (1860); *Patchen v. Walton*, 17 N. Y. App. Div. 158 (1897), (45 N. Y. Supp. 145); *Allen v. Hancock*, 16 Vt. 230 (1884).

² See *Lincoln v. Walker*, 5 Am. & Eng. Corp. Cas. 610, 615 (1884), where the position of each state is shown and the authorities cited.

might reasonably reach different conclusions, the question whether or not the injured person was guilty of contributory negligence is a question of fact to be determined by the jury.¹ But if, from the undisputed facts bearing upon the issue, but one conclusion can reasonably be drawn, or if there is no direct evidence upon the issue

¹ *Alabama.* *Birmingham v. McCary*, 84 Ala. 469, 478 (1887), (4 So. Rep. 630).

Connecticut. *Lutton v. Vernon*, 62 Conn. 1 (1892), (23 Atl. Rep. 1020).

Delaware. *Wilkins v. Wilmington*, 2 Marv. 132 (1895), (42 Atl. Rep. 418).

Illinois. *Chicago v. McLean*, 133 Ill. 148, 154 (1890), (24 N. E. Rep. 527).

Iowa. *Byerly v. Anamosa*, 79 Ia. 204, 206 (1890), (44 N. W. Rep. 359).

Maine. *Johnson v. Whitefield*, 18 Me. 286 (1841); *Morse v. Belfast*, 77 Me. 44, 46 (1885).

Massachusetts. *Bigelow v. Rutland*, 4 Cush. 247 (1849); *Britton v. Cummington*, 107 Mass. 347 (1871).

Michigan. *Wakeham v. St. Clair Township*, 91 Mich. 15 (1892), (51 N. W. Rep. 696).

Missouri. *Staples v. Canton*, 69 Mo. 592, 594 (1879); *Barr v. Kansas City*, 105 Mo. 550, 558 (1891), (16 S. W. Rep. 483).

Nebraska. *Plattsmouth v. Mitchell*, 20 Neb. 228, 230 (1886), (29 N. W. Rep. 593); *Ponca v. Crawford*, 23 Neb. 662, 665 (1888), (37 N. W. Rep. 609); *Omaha v. Richards*, 49 Neb. 244 (1896), (68 N. W. Rep. 528).

New Hampshire. *Daniels v. Lebanon*, 58 N. H. 284 (1878).

New York. *Shook v. Cohoes*, 108 N. Y. 648 (1888), (15 N. E. Rep. 531); *Schafer v. Mayor, etc. of New York*, 154 N. Y. 466, 471 (1897), (48 N. E. Rep. 749).

Pennsylvania. *Scranton v. Gore*, 124 Pa. St. 595, 609 (1889), (17 Atl. Rep. 144); *Sprowls v. Morris Township*, 179 Pa. St. 219, 224 (1897), (36 At. Rep. 242); *Musick v. Latrobe*, 184 Pa. St. 375, 385 (1898), (39 Atl. Rep. 226).

Rhode Island. *Hampson v. Taylor*, 15 R. I. 83, 88 (1887), (8 Atl. Rep. 331).

West Virginia. *Phillips v. Huntington*, 35 W. Va. 406, 417 (1891), (14 S. E. Rep. 17).

Wisconsin. *Burns v. Elba*, 32 Wis. 605, 611 (1873); *Jung v. Stevens Point*, 74 Wis. 547 (1889), (43 N. W. Rep. 513).

and all the inferences that may fairly be drawn from the facts in the case point to but one conclusion, then the question may be decided by the court as a matter of law.¹

§ 128. **What a Traveller may assume.** — In the absence of anything that would suggest to the mind of a man of ordinary prudence a peril of travel, a person who is passing along a public highway is not bound to anticipate danger, but has a right to assume that the municipal authorities have made the way reasonably safe for public travel in the ordinary modes. And he may indulge in this assumption as well when he is travelling in the night-time as when he is travelling by daylight.² "A

¹ *Tuffree v. State Center*, 57 Ia. 538 (1881), (11 N. W. Rep. 1); *Mathews v. Cedar Rapids*, 80 Ia. 459 (1890), (45 N. W. Rep. 894); *Tasker v. Farmingdale*, 91 Me. 521 (1898), (40 Atl. Rep. 544); *Nicholas v. Peck*, 20 R. I. 533 (1898), (40 Atl. Rep. 418); *Bills v. Kaukauna*, 94 Wis. 310, 315 (1896), (68 N. W. Rep. 992).

It has been held that it could not be said as a matter of law that it was negligence to allow the reins to become entangled, *Bigelow v. Rutland*, 4 Cush. (Mass.) 247 (1849); *Hall v. Kansas City*, 54 Mo. 598 (1874); or for a woman to drive, *Cobb v. Standish*, 14 Me. 198 (1837); *Blood v. Tyngsborough*, 103 Mass. 509 (1870); or for a person to run in the street, *Penrose v. Fehr*, 113 Mich. 517 (1897), (71 N. W. Rep. 862); *Barr v. Kansas City*, 105 Mo. 550, 558 (1891), (16 S. W. Rep. 483).

² *Alabama.* *Birmingham v. Starr*, 112 Ala. 98 (1895), (20 So. Rep. 424).

Connecticut. *Lutton v. Vernon*, 62 Conn. 1, 11 (1892), (23 Atl. Rep. 1020).

Delaware. *Robinson v. Wilmington*, 8 Houst. 409, 414 (1889), (32 Atl. Rep. 347).

Illinois. *East Dubuque v. Burhyte*, 173 Ill. 553, 558 (1898), (50 N. E. Rep. 1077).

Indiana. *Stevens v. Logansport*, 76 Ind. 498, 503 (1881).

Iowa. *Robinson v. Cedar Rapids*, 100 Ia. 662, 664 (1897), (69 N. W. Rep. 1064); *Keyes v. Cedar Falls*, 107 Ia. 509, 514 (1899), (78 N. W. Rep. 227).

Massachusetts. *Thompson v. Bridgewater*, 7 Pick. 188 (1828).

Michigan. *Baker v. Grand Rapids*, 111 Mich. 447 (1897), (69 N. W. Rep. 740).

person may walk or drive in the darkness of the night," says Chief Justice Hunt in *Davenport v. Ruckman*,¹ "relying upon the belief that the corporation has performed its duty and that the street or the walk is in a safe condition. He walks by a faith justified by law, and if his

Missouri. *Stephens v. Macon*, 83 Mo. 345, 353 (1884).

Nebraska. *Lincoln v. Walker*, 18 Neb. 250 (1885), (25 N. W. Rep. 66).

New York. *Weed v. Ballston Spa*, 76 N. Y. 329, 333 (1879); *Pettengill v. Yonkers*, 116 N. Y. 558, 564 (1889), (22 N. E. Rep. 1095).

Ohio. *Circleville v. Neuding*, 41 Oh. St. 465 (1885).

Vermont. *Glidden v. Reading*, 38 Vt. 52, 57 (1865); *Drew v. Sutton*, 55 Vt. 586, 589 (1882).

Virginia. *Gordon v. Richmond*, 83 Va. 436, 440 (1887), (2 S. E. Rep. 727).

Wisconsin. *Milwaukee v. Davis*, 6 Wis. 377 (1857); *Seward v. Milford*, 21 Wis. 485, 490 (1867); *Wall v. Highland*, 72 Wis. 435, 438 (1888), (39 N. W. Rep. 560).

"A person desiring to cross the street either in the night time or in the day time is not confined to a crossing. He has a right to assume that all parts of the street intended for travel are reasonably safe; and if in the night time he desires to cross from one side to the other, knows of no dangerous excavation in the street, or other obstruction, he may cross at any point that suits his convenience, without being liable to the imputation of negligence." *Brusso v. Buffalo*, 90 N. Y. 679, 680 (1882); *Raymond v. Lowell*, 6 Cush. (Mass.) 524, 530 (1850); *Lincoln v. Detroit*, 101 Mich. 245 (1894), (59 N. W. Rep. 617); *Baker v. Grand Rapids*, 111 Mich. 447 (1897), (69 N. W. Rep. 740), accord. And see also *Stack v. Portsmouth*, 52 N. H. 221 (1872); *Denver v. Sherret*, 88 Fed. Rep. 226, 235 (1898).

In *Dallas v. Webb*, 22 Tex. Civ. App. 48 (1899), (54 S. W. Rep. 398), the court held that a pedestrian, injured in crossing a street at a place other than a crossing, might recover therefor when his injury was caused by the city's maintaining a place dangerous to pedestrians only. But in *Dayton v. Taylor's Adm'r*, 62 Oh. St. 11 (1900), (56 N. E. Rep. 480), it was held that a person who, without necessity, left the sidewalk and street crossings, upon which he would have avoided injury, and, while attempting to cross the street diagonally, was injured by slipping into a catch-basin, must be held to have assumed the risks that lay in the path which he chose for his own convenience.

¹ 37 N. Y. 568 (1868), at page 573.

faith is unfounded and he suffers an injury, the party in fault must respond in damages."

A traveller is not bound, therefore, to give his whole attention to the highway over which he is passing, nor to keep his eyes constantly fixed upon the pavement or road-bed, watching for defects;¹ nor need he look far ahead for defects or obstructions.² Hence if, while his attention is momentarily diverted, he falls into an excavation or runs against an obstruction, the presence of which was not known to him, he is not necessarily, as a matter of law, guilty of contributory negligence, and that, too, even though such accident happens in broad daylight.³

¹ *Chicago v. Babcock*, 143 Ill. 358, 363 (1892), (32 N. E. Rep. 271); *Baxter v. Cedar Rapids*, 103 Ia. 599 (1897), (72 N. W. Rep. 790); *Laverdure v. Mayor, etc. of New York*, 28 N. Y. App. Div. 65 (1898), (50 N. Y. Supp. 882); *West v. Eau Claire*, 89 Wis. 31, 36 (1894), (61 N. W. Rep. 313).

² *Thompson v. Bridgewater*, 7 Pick. (Mass.) 188 (1828).

³ *Delaware*. *Robinson v. Wilmington*, 8 Houst. 409, 414 (1889), (32 Atl. Rep. 347).

Illinois. *Chicago v. Babcock*, 143 Ill. 358, 363 (1892), (32 N. E. Rep. 271).

Iowa. *Mathews v. Cedar Rapids*, 80 Ia. 459 (1890), (45 N. W. Rep. 894); *Barnes v. Marcus*, 96 Ia. 675 (1896), (65 N. W. Rep. 984).

Massachusetts. *Woods v. Boston*, 121 Mass. 337 (1876).

Michigan. *Mackie v. West Bay City*, 106 Mich. 242 (1895), (64 N. W. Rep. 25).

New York. *Dale v. Syracuse*, 71 Hun, 449, 451 (1893), (24 N. Y. Supp. 968); *Cummings v. New Rochelle*, 38 N. Y. App. Div. 583 (1899), (56 N. Y. Supp. 701).

Wisconsin. *Cantwell v. Appleton*, 71 Wis. 463, 468 (1888), (37 N. W. Rep. 813).

United States. *Osborne v. Detroit*, 32 Fed. Rep. 36, 42 (1886).

In Pennsylvania the rule is that travellers are bound to look where they are going, and if one is injured by an obvious defect he is as a matter of law guilty of contributory negligence. *Robb v. Connellsville*, 137 Pa. St. 42 (1890), (20 Atl. Rep. 564); *Shallcross v. Philadelphia*, 187 Pa. St. 143 (1898), (40 Atl. Rep. 818).

In *Mathews v. Cedar Rapids*, 80 Ia. 459 (1890), at page 465, (45

No presumption as to the condition of a highway is permissible where there is actual knowledge. Hence when a traveller approaches a portion of a street known by him to be defective, he has no right to indulge in, or to act upon, the assumption that it is safe;¹ but it has been held in some cases that under such circumstances he might assume that the defect had been remedied.²

§ 129. The Effect of Infancy. — The law presumes that an infant of very tender years is not capable of exercising any degree of care for his own safety. It is the general rule, therefore, that personal contributory negligence cannot be attributed to a child so young as to be *non sui*

. N. W. Rep. 894), Mr. Justice Granger says: "All persons know that temporary obstructions occur on streets and sidewalks; and it is not an unreasonable rule to hold that if in plain sight, and there is nothing to divert the attention of the traveller, he must notice them. The distinction is this: Such obstacles as are known to be present—as, for instance, boxes and barrels on the sidewalk, and vehicles, building material and rubbish in the street—challenge the attention of the traveller; and if, without excuse, he fails to observe them, and encounters them to his injury, the judgments of men would agree that he was negligent. But matters which he may not anticipate, as likely to occur, do not challenge such attention; and a failure to observe and avoid them is not, as a matter of law, negligence."

¹ *Kewanee v. Depew*, 80 Ill. 119, 121 (1875); *Scanlon v. Watertown*, 14 N. Y. App. Div. 1, 5 (1897), (43 N. Y. Supp. 618); *Neddo v. Ticonderoga*, 77 Hun (N. Y.), 524 (1894), (28 N. Y. Supp. 887); *Weston v. Troy*, 139 N. Y. 281 (1893), (34 N. E. Rep. 780); *Hopkins v. Rush River*, 70 Wis. 10, 14 (1887), (34 N. W. Rep. 909).

² *Watseka v. Smith*, 75 Ill. App. 391 (1897); *Horton v. Trompeter*, 35 Pac. Rep. 1106 (Kan., 1894); *Finn v. Adrian*, 93 Mich. 504, 506 (1892), (53 N. W. Rep. 614); *Whoram v. Argentine Township*, 112 Mich. 20 (1897), (70 N. W. Rep. 341).

But where it appeared that the defect was one of long standing, and was not of a character to interfere with the use of the highway; that it had not been called to the attention of the municipal authorities and there was no indication of a purpose on their part to repair it, it was held that the plaintiff had no right to presume that it had been repaired. *Dale v. Webster County*, 76 Ia. 370, 374 (1888), (41 N. W. Rep. 1).

juris. Hence such an infant may maintain an action against a municipal corporation for an injury occasioned by a culpable defect in the highway, although his injury would not have happened but for his concurring act, and although that act, if done by a person of full age, would bar the action.¹

While seven years is perhaps the commonly accepted age at which an infant is supposed to become *sui juris*, and hence capable of exercising some degree of care, the law does not fix any exact time after which he shall cease to have the benefit of the presumption made in his favor. Whether or not in any given case he was old enough to have sufficient capacity to understand, at least in some measure, the danger of the situation in which he is placed by reason of a defect in the highway and to act accordingly, is a question of fact for the jury to decide.²

When an infant has attained to sufficient age to be capable of exercising care and discretion, the law expects of him, not that degree which it exacts from a person of full age, but only that degree which may fairly and reasonably be expected of a child of his age and capacity.³

§ 130. The Effect of the Negligence of the Parents or Guardian of an Infant — Imputed Negligence. — The problem

¹ *Chicago v. Hesing*, 83 Ill. 204, 205 (1876); *Gavin v. Chicago*, 97 Ill. 66, 70 (1880); *Evansville v. Senhenn*, 151 Ind. 42, 43 (1898), (47 N. E. Rep. 634); *Grant v. Fitchburg*, 160 Mass. 16 (1893), (35 N. E. Rep. 84); *Lehman v. Brooklyn*, 29 Barb. (N. Y.) 234 (1859); *Kunz v. Troy*, 104 N. Y. 344, 350 (1887), (10 N. E. Rep. 442).

² *St. Paul v. Kuby*, 8 Minn. 154, 168 (1863); *Kunz v. Troy*, 104 N. Y. 344, 351 (1887), (10 N. E. Rep. 442).

³ *Bronson v. Southbury*, 37 Conn. 199 (1870); *Chicago v. Keefe*, 114 Ill. 222 (1885), (2 N. E. Rep. 267); *Pekin v. McMahon*, 154 Ill. 141, 154 (1895), (39 N. E. Rep. 484); *Dowd v. Chicopee*, 116 Mass. 93, 96 (1874).

whether the negligent acts of the parents or guardian of an infant of very tender years can be imputed to the latter so as to debar him from maintaining an action for an injury suffered by him by reason of the negligence of another has provoked much discussion in the courts of last resort. The ultimate result of it all is that in some States the question has been answered in the affirmative,¹ in others in the negative.²

§ 131. The Effect of the Negligence of a Third Person — Imputed Negligence. — It is pretty generally conceded that the negligent acts of a third person cannot be imputed to a traveller who is injured by a culpable defect in the high-

¹ *Aurora v. Seidelman*, 34 Ill. App. 285 (1889); *Leslie v. Lewiston*, 62 Me. 468, 472 (1873); *Grant v. Fitchburg*, 160 Mass. 16 (1893), (35 N. E. Rep. 84); *Kunz v. Troy*, 104 N. Y. 344, 351 (1887), (10 N. E. Rep. 442); *Parish v. Eden*, 62 Wis. 272, 284 (1885), (22 N. W. Rep. 399).

² *Wymore v. Mahaska County*, 78 Ia. 396 (1889), (43 N. W. Rep. 264); *Evansville v. Senheun*, 151 Ind. 42 (1898), (47 N. E. Rep. 634); *Shippy v. Au Sable*, 85 Mich. 280, 293 (1891), (48 N. W. Rep. 584).

To permit a child to play in the street is not negligence *per se*. *Aurora v. Seidelman*, 34 Ill. App. 285, 290 (1889); *Kunz v. Troy*, 104 N. Y. 344 (1887), (10 N. E. Rep. 442).

"In cases where persons are poor and their time constantly employed in making a living, such circumstances should be taken into account, and the same vigilance should not be required of them in respect to the care of their children as would be of rich people, who had plenty of leisure and means to employ servants; yet they must use such care as reasonable persons would do in their condition and surrounded by the same circumstances." *Aurora v. Seidelman*, 34 Ill. App. 285, 293 (1889).

In *McGarry v. Loomis*, 63 N. Y. 104 (1875), it was held that where the injured person was a child *non sui juris*, negligence on the part of its parents was no defence if the child itself had not committed, or omitted, any act that would constitute contributory negligence in a person of years of discretion. And it was held in *McMahon v. Mayor, etc. of New York*, 33 N. Y. 642, 647 (1865), that if the infant was *sui juris*, the negligence of his parents would not be imputed to him.

way so as to debar him from recovering compensation therefor, even though such negligent acts concurred in causing the injury, unless he sustained such a relation in respect to the matter then in progress to such third person that the negligent acts of the latter were in contemplation of law his acts.¹ The real difference of opinion upon this topic to be found in the books appears to be upon the narrower question whether or not a person who enters a private conveyance, with no authority to direct or control the movements of its driver, and with no reason to suspect the prudence or competency of that driver to drive in a reasonably careful and skilful manner, becomes so far identified with the latter that his negligent driving will prevent the recovery of damages from the municipality if it concurs with a culpable defect in the highway in occasioning an injury. Upon this question the authorities are about evenly divided.²

¹ "The general principle deducible from the decisions is," says Mr. Justice Mitchell in *Knightstown v. Musgrove*, 116 Ind. 121 (1888), at page 123, (18 N. E. Rep. 452), "that one who sustains an injury without any fault or negligence of his own, or of some one subject to his control or direction, or with whom he is so identified in a common enterprise as to become responsible for the consequences of his negligent conduct, may look to any other person for compensation whose neglect of duty occasioned the injury, even though the negligence of some third person with whom the injured person was not identified as above may have contributed thereto."

² In the following cases the negligence of such driver was imputed to the plaintiff:—

Connecticut. *Bartram v. Sharon*, 71 Conn. 686 (1899), (43 Atl. Rep. 143).

Michigan. *Mullen v. Owosso*, 100 Mich. 103 (1894), (58 N. W. Rep. 663).

Wisconsin. *Prideaux v. Mineral Point*, 43 Wis. 513 (1878); *Ritger v. Milwaukee*, 99 Wis. 190 (1898), (74 N. W. Rep. 815).

While in the following cases his negligence was held not to bar plaintiff's action:—

Indiana. *Knightstown v. Musgrove*, 116 Ind. 121 (1888), (18 N. E.

§ 132. **The Effect of travelling in the Darkness of Night.** — Since the duty of municipal corporations is to so keep their highways that they may be reasonably safe for ordinary travel not only in the daytime but in the darkness of the night as well, travellers have a right to assume, and to act upon the assumption, in the absence of knowledge to the contrary, that they can pass over the road which they contemplate using with reasonable safety, even though it be very dark.¹ Travelling at night is not, therefore, negligence *per se*. While the fact of darkness may require a greater degree of care and caution on the part of the traveller, it is at best simply evidence to be considered by the jury in deciding whether or not due care under the circumstances of the case was exercised.²

And so the failure to carry a light to aid in avoiding

Rep. 452); *Michigan City v. Boeckling*, 122 Ind. 39, 42 (1889), (23 N. E. Rep. 518).

Iowa. *Nesbit v. Garner*, 75 Ia. 314 (1888), (39 N. W. Rep. 516).

Minnesota. *Follman v. Mankato*, 35 Minn. 522 (1886), (29 N. W. Rep. 317).

New York. *Pettingill v. Olean*, 20 N. Y. Supp. 367 (1892).

North Dakota. *Ouverson v. Grafton*, 5 N. Dak. 281, 293 (1895), (65 N. W. Rep. 676).

Pennsylvania. *Carlisle v. Brisbane*, 113 Pa. St. 544 (1886), (6 Atl. Rep. 372).

¹ See page 224, *ante*, and cases cited in note 2.

² *Alabama.* *Montgomery v. Wright*, 72 Ala. 411, 421 (1882).

Connecticut. *Williams v. Clinton*, 28 Conn. 264 (1859).

Illinois. *Elgin v. Renwick*, 86 Ill. 498 (1877); *Normal v. Gresham*, 49 Ill. App. 196 (1892).

Iowa. *Stier v. Oskaloosa*, 41 Ia. 353, 357 (1875); *Hall v. Manson*, 90 Ia. 585, 588 (1894), (58 N. W. Rep. 881); *Owen v. Fort Dodge*, 98 Ia. 281, 288 (1896), (67 N. W. Rep. 281).

Maine. *Haskell v. New Gloucester*, 70 Me. 305 (1879).

Michigan. *Baker v. Grand Rapids*, 111 Mich. 447, 449 (1897), (69 N. W. Rep. 740).

Vermont. *Barber v. Essex*, 27 Vt. 62, 69 (1854).

Wisconsin. *Bills v. Kaukauna*, 94 Wis. 310, 314 (1896), (68 N. W. Rep. 992).

pitfalls or obstructions in the path while travelling in the dark is not negligence on the part of the traveller as a matter of law, but is merely evidence upon the question for the consideration of the jury.¹

§ 133. The Effect of Knowledge of the Existence of the Defect. — The general rule is now well settled that the mere fact that a person knows of a defect in the highway, and yet with that knowledge attempts to pass over it and suffers an injury by reason of such defect, is not of itself, as a matter of law, conclusive of his right to recover damages for his injury. It is simply evidence of a lack of due care on his part, such evidence, no doubt, as would presumptively establish contributory negligence. This presumption, however, is not conclusive by any means; it is, rather, distinctly disputable, and may be refuted by showing that he exercised ordinary care in view of all the circumstances, particularly in view of his knowledge of the condition of the highway.²

¹ *Williams v. Clinton*, 28 Conn. 264 (1859); *Keyes v. Cedar Falls*, 107 Ia. 509, 514 (1899), (78 N. W. Rep. 227); *Haskell v. New Gloucester*, 70 Me. 305 (1879); *Alleghany County v. Broadwater*, 69 Md. 533, 535 (1888), (16 Atl. Rep. 223); *Daniels v. Lebanon*, 58 N. H. 284 (1878).

² *Alabama*. *Montgomery v. Wright*, 72 Ala. 411, 421 (1882).

Connecticut. *Congdon v. Norwich*, 37 Conn. 414, 420 (1870),

District of Columbia. *District of Columbia v. Crumbaugh*, 13 App. Cas. 553 (1898).

Georgia. *Dempsey v. Rome*, 94 Ga. 420 (1894), (20 S. E. Rep. 335); *Samples v. Atlanta*, 95 Ga. 110 (1894), (22 S. E. Rep. 135).

Illinois. *Aurora v. Dale*, 90 Ill. 46 (1878); *Clayton v. Brooks*, 150 Ill. 97, 104 (1894), (37 N. E. Rep. 574); *Litchfield v. Anglim*, 83 Ill. App. 55 (1899).

Indiana. *Huntington v. Breen*, 77 Ind. 29, 33 (1881); *Richmond v. Mulholland*, 116 Ind. 173 (1888), (18 N. E. Rep. 832); *Fort Wayne v. Breese*, 123 Ind. 581 (1889), (23 N. E. Rep. 1038); *Williamsport v. Lisk*, 21 Ind. App. 414 (1899), (52 N. E. Rep. 628); *Huntington v. Folk*, 154 Ind. 91 (1899), (54 N. E. Rep. 759).

Iowa. *Rice v. Des Moines*, 40 Ia. 638, 642 (1875); *Ross v. Daven-*

Although a person may have knowledge of the existence of defective conditions in the highway, he is not on that account bound, as a matter of law, to abandon travel upon that highway altogether and to seek a safer route;¹ nor

port, 66 Ia. 548, 551 (1885), (24 N. W. Rep. 47); *Troxel v. Vinton*, 77 Ia. 90, 93 (1889), (41 N. W. Rep. 580); *Hall v. Manson*, 99 Ia. 698, 701 (1896), (68 N. W. Rep. 922); *Graham v. Oxford*, 105 Ia. 705, 708 (1898), (75 N. W. Rep. 473).

Kansas. *Maultby v. Leavenworth*, 28 Kan. 745, 748 (1882); *Emporia v. Schmidling*, 33 Kan. 485, 487 (1885), (6 Pac. Rep. 893); *Langan v. Atchison*, 35 Kan. 318, 326 (1886), (11 Pac. Rep. 38).

Maryland. *Prince George's County v. Burgess*, 61 Md. 29, 33 (1883); *Alleghany County v. Broadwaters*, 69 Md. 533, 535 (1888), (16 Atl. Rep. 233).

Massachusetts. *Reed v. Northfield*, 18 Pick. 94 (1832); *Frost v. Waltham*, 12 Allen, 85 (1866); *Barton v. Springfield*, 110 Mass. 131 (1872); *Kelly v. Blackstone*, 147 Mass. 448 (1888), (18 N. E. Rep. 217); *Norwood v. Somerville*, 159 Mass. 105 (1893), (33 N. E. Rep. 1108).

Michigan. *Lowell v. Watertown Township*, 58 Mich. 568 (1885), (25 N. W. Rep. 517); *Argus v. Sturgis*, 86 Mich. 344 (1891), (48 N. W. Rep. 1085); *Schwingschlegl v. Monroe*, 113 Mich. 683 (1897), (72 N. W. Rep. 7); *Urtel v. Flint*, 122 Mich. 65 (1899), (80 N. W. Rep. 991).

Minnesota. *Erd v. St. Paul*, 22 Minn. 443, 446 (1876); *McKenzie v. Northfield*, 30 Minn. 456 (1883), (16 N. W. Rep. 264); *Nichols v. Minneapolis*, 33 Minn. 430 (1885), (23 N. W. Rep. 868).

Missouri. *Smith v. St. Joseph*, 45 Mo. 449 (1870); *Flynn v. Neosho*, 114 Mo. 567, 572 (1892), (21 S. W. Rep. 903); *Graney v. St.*

¹ *Illinois.* *Mt. Sterling v. Crummy*, 73 Ill. App. 572, 575 (1897).

Indiana. *Gosport v. Evans*, 112 Ind. 133, 138 (1887), (13 N. E. Rep. 256); *Fort Wayne v. Breese*, 123 Ind. 581, 585 (1889), (23 N. E. Rep. 1038).

Kansas. *Emporia v. Schmidling*, 33 Kan. 485, 487 (1885), (6 Pac. Rep. 893); *Falls Township v. Stewart*, 3 Kan. App. 403, 407 (1895), (42 Pac. Rep. 926).

Missouri. *Graney v. St. Louis*, 141 Mo. 180, 185 (1897), (42 S. W. Rep. 941).

Pennsylvania. *Erie City v. Schwingle*, 22 Pa. St. 384 (1853).

even to go around the defective spot.¹ He may proceed along the path usually travelled without being subject to Louis, 141 Mo. 180 (1897), (42 S. W. Rep. 941); Stevens *v.* Walpole, 76 Mo. App. 213, 225 (1898).

Nebraska. Lincoln *v.* Calvert, 39 Neb. 305, 310 (1894), (58 N. W. Rep. 115).

New Hampshire. Griffin *v.* Auburn, 58 N. H. 121, 124 (1877).

New York. Niven *v.* Rochester, 76 N. Y. 619 (1879).

North Dakota. Ouverson *v.* Grafton, 5 N. Dak. 281, 291 (1895), (65 N. W. Rep. 676).

Pennsylvania. Humphreys *v.* Armstrong County, 56 Pa. St. 204 (1867); Merriman *v.* Phillipsburg, 158 Pa. St. 78 (1893), (28 Atl. Rep. 122).

Rhode Island. Hampson *v.* Taylor, 15 R. I. 83, 89 (1887), (8 Atl. Rep. 331).

Texas. Denison *v.* Sanford, 2 Tex. Civ. App. 661 (1893), (21 S. W. Rep. 784).

Utah. Dwyer *v.* Salt Lake City, 19 Utah, 521 (1899), (57 Pac. Rep. 535).

Vermont. Coates *v.* Canaan, 51 Vt. 131, 137 (1878); Templeton *v.* Montpelier, 56 Vt. 328, 332 (1883).

Washington. McQuillan *v.* Seattle, 10 Wash. 464, 466 (1895), (38 Pac. Rep. 1119).

West Virginia. Moore *v.* Huntington, 31 W. Va. 842, 849 (1888), (8 S. E. Rep. 512).

Wisconsin. Kavanaugh *v.* Janesville, 24 Wis. 618 (1869); Kenworthy *v.* Ironton, 41 Wis. 647, 654 (1877); Crites *v.* New Richmond, 98 Wis. 55, 60 (1897), (73 N. W. Rep. 322).

In determining whether or not a person who knows of a defect in the highway is negligent if he proceeds, "much depends" upon the character of the defect, the occasion for passing over it, and the care used in so doing. Graham *v.* Oxford, 105 Ia. 705, 708 (1898), (75 N. W. Rep. 473).

¹ *Connecticut.* Congdon *v.* Norwich, 37 Conn. 414, 420 (1870).

Illinois. Aurora *v.* Hillman, 90 Ill. 61 (1878); Flora *v.* Naney, 136 Ill. 45, 47 (1891), (26 N. E. Rep. 645).

Iowa. Kendall *v.* Albia, 73 Ia. 241, 249 (1877), (34 N. W. Rep. 833).

Kansas. Langan *v.* Atchison, 35 Kan. 318 (1886), (11 Pac. Rep. 38).

New York. Shook *v.* Cohoes, 108 N. Y. 648 (1888), (15 N. E. Rep. 531); Weston *v.* Troy, 139 N. Y. 281, 283 (1893), (34 N. E. Rep. 780).

the charge of contributory negligence, if by the exercise of care proportioned to the known danger he may reasonably expect to avoid the defect.¹. And the fact that he forgot for the moment the existence of the defect² or failed to locate it rightly,³ is not necessarily conclusive against him if he suffers an injury.

The courts will not, however, apply the general rule above stated, but will hold a traveller to be guilty of contributory negligence as a matter of law if it appears that, knowing of a condition of the highway which would naturally suggest to a person of common prudence that it was dangerous to attempt to pass over it, he voluntarily and deliberately and without necessity chose to go ahead and take the chances of being injured. A person cannot heedlessly and carelessly travel along a portion of the highway known to him to be so dangerous that men of ordinary care and prudence would not attempt to pass over it at their own risk, and still hold the cor-

¹ *Clayton v. Brooks*, 150 Ill. 97 (1894), (37 N. E. Rep. 574); *Hanlon v. Keokuk*, 7 Ia. 488 (1859); *Kinsley v. Morse*, 40 Kan. 577, 583 (1889), (20 Pac. Rep. 217); *Koch v. Ashland*, 88 Wis. 603 (1894), (60 N. W. Rep. 990).

² *Georgia. Dempsey v. Rome*, 94 Ga. 420 (1894), (20 S. E. Rep. 335).

Illinois. *Normal v. Gresham*, 49 Ill. App. 196 (1892); *Springfield v. Rosenmeyer*, 52 Ill. App. 301 (1893).

Massachusetts. *George v. Haverhill*, 110 Mass. 506 (1872).

Michigan. *Bouga v. Weare Township*, 109 Mich. 520 (1896), (67 N. W. Rep. 557).

Minnesota. *Maloy v. St. Paul*, 54 Minn. 398 (1893), (56 N. W. Rep. 94).

Washington. *McQuillan v. Seattle*, 10 Wash. 464 (1895), (38 Pac. Rep. 1119).

Wisconsin. *Cumisky v. Kenosha*, 87 Wis. 286 (1894), (58 N. W. Rep. 395); *Doan v. Willow Springs*, 101 Wis. 112, 116 (1898), (76 N. W. Rep. 1104).

³ *Aurora v. Dale*, 90 Ill. 46 (1878); *Blood v. Tyngsborough*, 103 Mass. 509 (1870).

poration responsible for any injury that may result to him.¹

Connecticut. *Fox v. Glastenbury*, 29 Conn. 204 (1860).

Georgia. *Samples v. Atlanta*, 95 Ga. 110, 114 (1894), (22 S. E. Rep. 135), *semble*.

Indiana. *Gosport v. Evans*, 112 Ind. 133 (1887), (13 N. E. Rep. 256).

Iowa. *Nichols v. Laurens*, 96 Ia. 388 (1895), (65 N. W. Rep. 335), *semble*.

Kansas. *Corlett v. Leavenworth*, 27 Kan. 673 (1882).

Maine. *Merrill v. North Yarmouth*, 78 Me. 200 (1886), (3 Atl. Rep. 575).

Maryland. *Baltimore v. Holmes*, 39 Md. 243 (1873), *semble*.

Massachusetts. *Gilman v. Deerfield*, 15 Gray, 577 (1860), as explained in *Kelly v. Blackstone*, 147 Mass. 448 (1888), (18 N. E. Rep. 217); *Wilson v. Charlestown*, 8 Allen, 137 (1864); *Fox v. Chelsea*, 171 Mass. 297 (1898), (50 N. E. Rep. 622).

Michigan. *Smith v. Walker Township*, 117 Mich. 14 (1898), (75 N. W. Rep. 141).

Mississippi. *Meridian v. Hyde*, 11 So. Rep. 108 (1891).

Missouri. *Bassett v. St. Joseph*, 53 Mo. 290, 303 (1873).

New Hampshire. *Farnum v. Concord*, 2 N. H. 392 (1821); *Hubbard v. Concord*, 35 N. H. 52, 63 (1857).

New York. *Griffin v. Mayor, etc. of New York*, 9 N. Y. 456 (1854).

Ohio. *Schaeffler v. Sandusky*, 33 Oh. St. 246 (1877).

Pennsylvania. *Forks Township v. King*, 84 Pa. St. 230, 233 (1877); *Brendlinger v. New Hanover Township*, 148 Pa. St. 93 (1892), (23 Atl. Rep. 1105); *Winner v. Oakland Township*, 158 Pa. St. 405 (1893), (27 Atl. Rep. 1110, 1111).

South Carolina. *Laney v. Chesterfield County*, 29 S. C. 140 (1888), (7 S. E. Rep. 56); *Magill v. Lancaster County*, 39 S. C. 27 (1892), (17 S. E. Rep. 507).

West Virginia. *Moore v. Huntington*, 31 W. Va. 842 (1888), (8 S. E. Rep. 512).

Wisconsin. *Welsh v. Argyle*, 89 Wis. 649 (1895), (62 N. W. Rep. 517); *De Pere v. Hibbard*, 104 Wis. 666 (1899), (80 N. W. Rep. 933).

In some cases it is said that in order to render a person who goes ahead with knowledge of the defective condition of the highway guilty of contributory negligence, as a matter of law it must appear that the defect was of such a character as to render the highway practically impassable. *Corts v. District of Columbia*, 18 D. C. 277 (1889); *Prince George's County v. Burgess*, 61 Md. 29, 34 (1883). But generally the question "in such cases is whether the danger is so patent and threatening as that one of ordinary care and prudence would not have taken the chances of travelling over that particular portion of

§ 134. The Effect of Defective Vision — Total Blindness.

— Persons whose vision was always imperfect, and persons whose sight has become dimmed by age or injured by disease, are still entitled to use the public highways, and to act upon the same presumption of safety as persons whose vision is perfect. It is not, therefore, negligence as a matter of law for them to attempt to travel upon the highway unattended. The fact of defective vision is simply a circumstance to go to the jury, to be considered by them in determining whether in attempting to use the highway at the time in question the injured person was exercising such reasonable care and caution as an ordinarily prudent man, laboring under a like infirmity, would exercise under similar circumstances.¹

And ordinarily the rule is the same even though the traveller is totally blind.² “Blindness of itself is not negligence. Nor can passing upon the highway, with the sight of external things cut off by physical incapacity of vision in the traveller, be negligence, in and of itself, the street or sidewalk.” *Stevens v. Walpole*. 76 Mo. App. 213, 226 (1898), and see cases cited on page 236, note 1.

It has been held that travelling in a violent storm was not negligence as a matter of law, *Bills v. Kaukauna*, 94 Wis. 310, 314 (1896), (68 N. W. Rep. 992); nor driving at a considerable rate of speed, *Bly v. Haverhill*, 110 Mass. 520 (1872); *Bills v. Kaukauna*, 94 Wis. 310, 314 (1896), (68 N. W. Rep. 992); nor reclining upon the wagon while driving, *Parish v. Eden*, 62 Wis. 272, 285 (1885), (22 N. W. Rep. 399); nor the use of an unusual vehicle, *Sewell v. Cohoes*, 75 N. Y. 45 (1878). For a case involving the use of a bicycle, see *Sutphen v. North Hempstead*, 80 Hun (N. Y.), 409 (1894), (30 N. Y. Supp. 128).

¹ *Smith v. Cairo*, 48 Ill. App. 166 (1891); *Winn v. Lowell*, 1 Allen (Mass.), 177 (1861); *Sweeney v. Butte City*, 15 Mont. 274 (1895), (39 Pac. Rep. 286); *Davenport v. Ruckman*, 37 N. Y. 568, 573 (1868); *Peach v. Utica*, 10 Hun (N. Y.), 477, 480 (1877).

² *Franklin v. Harter*, 127 Ind. 446 (1890), (26 N. E. Rep. 882); *Sleeper v. Sandown*, 52 N. H. 244 (1872); *Stewart v. Nashville*, 96 Tenn. 50, 57 (1895), (33 S. W. Rep. 613). And see also *Neff v. Wellesley*, 148 Mass. 487, 495 (1889), (20 N. E. Rep. 111).

any more than passing upon the highway when the same things are wholly obscured by the darkness of the night. . . . Although blindness in itself is not negligence, still, in judging of the conduct of a blind man, his unfortunate disability must be considered, and he must doubtless be held to govern his conduct with a reasonable regard to his situation in that respect.”¹

§ 135. **The Effect of Intoxication.** — If it appears that the injured person was intoxicated at the time of the accident, that is an important circumstance to be considered by the jury upon the question whether or not due care was exercised by him. The fact of travelling upon the highway while intoxicated will not of itself debar him from maintaining an action if he is injured by a culpable defect therein; it simply makes proper the exaction of a greater degree of care from him. He will, therefore, be entitled to recover compensation for his injury, unless it appears that the degree of care which his condition demanded was not used, and that such neglect contributed to the accident.²

¹ Mr. Justice Ladd, in *Sleeper v. Sandown*, 52 N. H. 244 (1872), at page 251. In that case the court says that the question was whether the injured person could undertake to travel upon the particular part of the highway where he was injured at the time and in the way he did, “taking into consideration his total blindness, and at the same time his familiarity with the road, his ability to do various kinds of work, to go about unattended and take care of himself, the increased activity, fidelity, and power of his other senses consequent upon his blindness, if the fact were so.”

² *Connecticut.* *Ashborn v. Waterbury*, 70 Conn. 551, 554 (1898), (40 Atl. Rep. 458).

Illinois. *Aurora v. Hillman*, 90 Ill. 61 (1878).

Iowa. *Cramer v. Burlington*, 42 Ia. 315, 320 (1875).

Maine. *Stuart v. Machias Port*, 48 Me. 477 (1861).

Massachusetts. *Alger v. Lowell*, 3 Allen, 402, 406 (1862).

New York. *Monk v. New Utrecht*, 104 N. Y., 552, 561 (1887), (11 N. E. Rep. 268).

Wisconsin. *Burns v. Elba*, 32 Wis. 605, 613 (1873); *Seymer v. Lake*, 66 Wis. 651 (1886), (29 N. W. Rep. 554).

In Woods v. Tipton County, 128 Ind. 289 (1890), (27 N. E. Rep.

§ 136. The Effect of Defective Powers of Locomotion. — Persons whose powers of locomotion are impaired have nevertheless a right to travel upon the public highways. The fact alone, therefore, that a person injured by a culpable defect in the highway was a cripple will not defeat his right of recovery as a matter of law; nor even as a matter of fact, if he can satisfy the jury that he was at the time of the accident exercising care commensurate with his infirmity of locomotion.¹

§ 137. The Application of the Maxim Volenti non fit Injuria. — The doctrine expressed by this maxim has, it seems, only a limited application to actions for injuries suffered by reason of culpable defects in the public highways. To make it applicable to such actions, it is not enough to show that the injured person was, at the time of the accident, intentionally exposing himself to the possibility of injury by travelling upon a highway that he knew to be defective.² It must also be taken into account that travel upon the public ways is a matter not merely of right, but usually also of necessity. What was the constraint or exigency by which the injured person was led to undertake the trip? Was it such as to affect his apprecia-

611), it was held that if a traveller by voluntary intoxication exposed himself to danger and received an injury that he could by the exercise of ordinary prudence avoid, if sober, he was guilty of contributory negligence. See also *Loftus v. North Adams*, 160 Mass. 161 (1893), (35 N. E. Rep. 674).

If the injured person was sober at the time when the accident happened, the fact that he was a man of intemperate habits is not admissible in evidence. *Langworthy v. Green Township*, 88 Mich. 207 (1891), (50 N. W. Rep. 130); *Hampson v. Taylor*, 15 R. I. 83, 88 (1885), (8 Atl. Rep. 331). And see also as to this point *Edwards v. Worcester*, 172 Mass. 104 (1898), (51 N. E. Rep. 447).

¹ *Mt. Vernon v. Brooks*, 39 Ill. App. 426, 433 (1890); *Smith v. Cairo*, 48 Ill. App. 166 (1891); *Higgins v. Glens Falls*, 11 N. Y. Supp. 289 (1890).

² See § 133, *ante*.

tion of the nature and degree of the danger from the existence of the defect, or to lead him to assume a risk that he would not take under ordinary circumstances? Such considerations affect in large measure the question whether the assumption of the risk was voluntary, and whether he was justified in exposing himself to a greater danger than he could prudently incur under ordinary circumstances.¹

But, nevertheless, if, when the exigency of the case does not require it, a person voluntarily chooses to travel upon a highway which he knows to be defective, understanding the danger of such a course, he will be held to have assumed the risk, and will be debarred from maintaining an action for any injury he may suffer.²

J. LACK OF FUNDS.

§ 138. The Lack of Means as a Defence. — The duty of municipal corporations relative to highways is not greater than, but only commensurate with, the power vested in them for its performance. Whenever, therefore, they have not at their command the means with which to make, or to cause to be made, needed repairs, they are not responsible for any injuries that may result to travellers from their failure to so do.³ But this does not mean that a mere absence of available funds in the treasury is sufficient to release them from the performance of their duty to repair. Although there may be no money in the treasury available for the purpose, a municipality will still be liable for the consequences of its failure to

¹ *Pomeroy v. Westfield*, 154 Mass. 462 (1891), (28 N. E. Rep. 899).

² *Gilman v. Deerfield*, 15 Gray (Mass.), 577 (1860); *Wilson v. Charlestown*, 8 Allen (Mass.), 137 (1864).

³ *Garlinghouse v. Jacobs*, 29 N. Y. 297 (1864); *Monk v. New Utrecht*, 104 N. Y. 552, 557 (1887), (11 N. E. Rep. 268); *Whitfield v. Meridian*, 66 Miss. 570, 575 (1889), (6 So. Rep. 244).

properly maintain its public ways if it appears that it had either the power to provide the necessary funds by taxation or otherwise;¹ or the power to enforce contributions of labor from its inhabitants;² or the power to make the needed repairs and charge up the cost upon the abutting property.³

PART III.

Statutory Notice of the Accident.

§ 139. **The Effect of a Statutory Provision requiring the giving of a Notice of the Accident.** — In order to enable municipal corporations to investigate their liability in

¹ *Alabama.* Albrittin v. Huntsville, 60 Ala. 486 (1877).

Illinois. Mt. Vernon v. Brooks, 39 Ill. App. 426, 431 (1890).

Michigan. Moon v. Ionia, 81 Mich. 635 (1890), (46 N. W. Rep. 25).

Minnesota. Shartle v. Minneapolis, 17 Minn. 308 (1871).

New York. Hines v. Lockport, 50 N. Y. 236, 238 (1872); Pomfrey v. Saratoga Springs, 104 N. Y. 459, 468 (1887), (11 N. E. Rep. 43); Ivory v. Deerpark, 116 N. Y. 476, 484 (1889), (22 N. E. Rep. 1080).

Pennsylvania. Erie v. Schwingle, 22 Pa. St. 384 (1853).

Wisconsin. Burns v. Elba, 32 Wis. 605, 610 (1873).

United States. Evanston v. Gunn, 99 U. S. 660, 667 (1878).

² *Birmingham v. Lewis*, 92 Ala. 352 (1890), (9 So. Rep. 243); *Lombar v. East Tawas*, 86 Mich. 14, 23 (1891), (48 N. W. Rep. 947); *Weed v. Ballston Spa*, 76 N. Y. 329, 334 (1879). In this last case the court says, at page 335: "The ability to summon the inhabitants to do highway labor, should be regarded as means under the control of the corporation for performing the duty imposed."

³ *New Albany v. McCulloch*, 127 Ind. 500, 503 (1890), (26 N. E. Rep. 1074); *Shelby v. Clagett*, 46 Oh. St. 549, 553 (1889), (22 N. E. Rep. 407).

Hence it is no defence that the supervisor neglected or refused to pay over to the highway commissioner the necessary funds with which to make repairs. *Clapper v. Waterford*, 62 Hun (N. Y.), 170 (1891), (16 N. Y. Supp. 640).

A lack of means constitutes no defence where the action is for injuries due to defects in the original construction of the highway. *Bartle v. Des Moines*, 38 Ia. 414 (1874).

each case where an injury is alleged to have been sustained by reason of a defect in the highway, at a time when the important facts relating to the condition of the way and to the circumstances of the accident are easily accessible, thus giving them an opportunity to settle without litigation such claims as may prove to be honest and well founded and to resist more successfully such as turn out to be false or exaggerated, provisions have been enacted in many states, sometimes in the general laws and sometimes in the charter of a particular corporation, requiring an injured person to give, within a specified time, a notice of his accident.¹ Provisions of this kind are generally construed by the courts to be mandatory in character, and not directory merely. The giving of such a notice, when required, is generally held, therefore, to be a condition precedent to maintaining an action for the injury,² and must be alleged in the pleadings and

¹ See *Shaw v. Waterbury*, 46 Conn. 263 (1878); *Whitman v. Groveland*, 131 Mass. 553, 556 (1881); *Sargent v. Gilford*, 66 N. H. 543 (1891), (27 Atl. Rep. 306); *Reining v. Buffalo*, 102 N. Y. 308, 310 (1886), (6 N. E. Rep. 792); *White v. Stowe*, 54 Vt. 510 (1881); *Wentworth v. Summit*, 60 Wis. 281, 283 (1884), (19 N. W. Rep. 97).

² *Colorado*. *Cunningham v. Denver*, 23 Col. 18 (1896), (45 Pac. Rep. 356).

Iowa. *Starling v. Bedford*, 94 Ia. 194 (1895), (62 N. W. Rep. 674); *Giles v. Shenandoah*, 82 N. W. Rep. 466 (1900).

Maine. *Greenleaf v. Norridgwock*, 82 Me. 62 (1889), (19 Atl. Rep. 91).

Massachusetts. *Kenady v. Lawrence*, 128 Mass. 318 (1880).

Minnesota. *Engstrom v. Minneapolis*, 78 Minn. 200 (1899), (80 N. W. Rep. 962).

New Hampshire. *Sargeut v. Gilford*, 66 N. H. 543 (1891), (27 Atl. Rep. 306).

New York. *Reining v. Buffalo*, 102 N. Y. 308 (1886), (6 N. E. Rep. 792); *Borst v. Sharon*, 24 N. Y. App. Div. 599 (1898), (48 N. Y. Supp. 996).

Wisconsin. *Susenguth v. Rantoul*, 48 Wis. 334 (1879), (4 N. W. Rep. 328); *Sowle v. Tomah*, 81 Wis. 349, 351 (1892), (51 N. W. Rep. 571).

proved at the trial.¹ Indeed, so strictly is this construction applied that it is commonly held that a municipality cannot, if it would, waive compliance with such a requirement.²

§ 140. The Sufficiency of the Notice. — The items which a statutory provision requires to be set forth in a notice of the accident must all be stated,³ though not in any particular form of words. A communication that sets each of them out with reasonable fulness, although without technical formality or scientific precision, will ordinarily satisfy the statutory requirements.⁴ The minuteness with which the required items should be stated must depend very largely upon the circumstances of each particular case.⁵ But the broad general rule is that the notice must

¹ *Maddox v. Randolph County*, 65 Ga. 216 (1880); *Reining v. Buffalo*, 102 N. Y. 308 (1886), (6 N. E. Rep. 792); *Benware v. Pine Valley*, 53 Wis. 527 (1881), (10 N. W. Rep. 695); *Wentworth v. Summit*, 60 Wis. 281 (1884), (19 N. W. Rep. 97).

² *Iowa*. *Starling v. Bedford*, 94 Ia. 194 (1895), (62 N. W. Rep. 674).

Maine. *Veazie v. Rockland*, 68 Me. 511 (1878).

Massachusetts. *Gay v. Cambridge*, 128 Mass. 387 (1880); *Madden v. Springfield*, 131 Mass. 441 (1881).

New York. *Borst v. Sharon*, 24 N. Y. App. Div. 599, 602 (1898), (48 N. Y. Supp. 996).

And see also *Hoyle v. Putnam*, 46 Conn. 56 (1878).

³ *Denver v. Saulcey*, 5 Col. App. 420, 422 (1895), (38 Pac. Rep. 1098); *Underhill v. Washington*, 46 Vt. 767 (1874); *Babcock v. Guilford*, 47 Vt. 519 (1875).

⁴ *Harris v. Newbury*, 128 Mass. 321, 325 (1880); *Kenady v. Lawrence*, 128 Mass. 318 (1880); *McNulty v. Cambridge*, 130 Mass. 275 (1881); *Robin v. Bartlett*, 64 N. H. 426 (1887), (13 Atl. Rep. 645); *Quinn v. Sempronius*, 33 N. Y. App. Div. 70, 73 (1898), (53 N. Y. Supp. 325).

A verbal notice, where the statute requires one in writing, is not sufficient. *Veazie v. Rockland*, 68 Me. 511 (1878). And any deficiencies in the written notice cannot be supplied by oral statements made to the officers of the corporation. *Roberts v. Douglas*, 140 Mass. 129 (1885), (2 N. E. Rep. 775).

⁵ *Larkin v. Boston*, 128 Mass. 521, 522 (1880); *Donnelly v. Fall*

be so reasonably specific in its statement of each of the necessary particulars as to be of substantial assistance to the officers of the corporation in investigating the case.¹

The question of the sufficiency of a notice is one of law, to be determined by the court from an inspection of the whole communication.² The rules of construction, however, are not to be applied to it with technical strictness.³

§ 141. The Statement of the Time of the Accident. — As a general rule simply stating the day upon which the injury was sustained, provided the year also is given,⁴ is a sufficient compliance with a statutory provision requiring a statement in the notice of the time of the happening of the accident. The hour of the day need not be set out, unless it appears that something depends upon the exact time of the accident.⁵

Any material variance between the time of the accident as stated in the notice and as proved at the trial is fatal.⁶

River, 132 Mass. 299, 301 (1882); Benson *v.* Madison, 101 Wis. 312 (1898), (77 N. W. Rep. 161).

¹ Dalton *v.* Salem, 136 Mass. 278 (1884); Canterbury *v.* Boston, 141 Mass. 215 (1886), (4 N. E. Rep. 808); Benson *v.* Madison, 101 Wis. 312 (1898), (77 N. W. Rep. 161).

² Rogers *v.* Shirley, 74 Me. 144, 151 (1882); Shea *v.* Lowell, 132 Mass. 187 (1882); Lyman *v.* Hampshire County, 138 Mass. 74 (1884); Holcomb *v.* Danbury, 51 Vt. 428 (1879).

³ See Spellman *v.* Chicopee, 131 Mass. 443 (1881).

⁴ White *v.* Stowe, 54 Vt. 510 (1881).

⁵ Lilly *v.* Woodstock, 59 Conn. 219, 224 (1890), (22 Atl. Rep. 40); Donnelly *v.* Fall River, 132 Mass. 299 (1882); Welch *v.* Gardner, 138 Mass. 529 (1882); Cronin *v.* Boston, 135 Mass. 110 (1883); Sherry *v.* Rochester, 62 N. H. 346 (1882).

⁶ Shaw *v.* Waterbury, 46 Conn. 263, 266 (1878), where a variation of forty days was held to be fatal. Sullivan *v.* Syracuse, 77 Hun (N. Y.), 440, 442 (1894), (29 N. Y. Supp. 105), where it was held that there was no material variance when the notice stated that the accident happened on August 5, and it appeared at the trial that it happened on the evening of August 4.

§ 142. **The Statement of the Place of the Accident.** — The place where the accident happened should be stated in the notice, when the statute requires it,¹ with sufficient particularity to make it possible for the municipal authorities to locate, with reasonable certainty, the precise spot.² This rule obviously is not satisfied by simply naming the street or road upon which the injury was received, especially if such street or road is of any considerable length.³ The location should be made more exact by reference to nearby buildings,⁴ to another

¹ Where the required statement of the place of the accident was wholly omitted, the notice was held to be insufficient. *Underhill v. Washington*, 46 Vt. 767 (1874).

² *Connecticut*. *Shaw v. Waterbury*, 46 Conn. 263, 266 (1878).

Maine. *Chapman v. Nobleboro*, 76 Me. 427 (1884).

Massachusetts. *Lowe v. Clinton*, 133 Mass. 526 (1882); *McCabe v. Cambridge*, 134 Mass. 484 (1883); *Shallow v. Salem*, 136 Mass. 136 (1883); *Lyman v. Hampshire County*, 138 Mass. 74 (1884); *Hughes v. Lawrence*, 160 Mass. 474 (1894), (36 N. E. Rep. 485).

Nebraska. *Lincoln v. Pirner*, 81 N. W. Rep. 846 (1900).

New Hampshire. *Horne v. Rochester*, 62 N. H. 347 (1882); *Carr v. Ashland*, 62 N. H. 665 (1883).

New York. *Werner v. Rochester*, 77 Hun, 33 (1894), (28 N. Y. Supp. 226); *Cross v. Elmira*, 86 Hun, 467 (1895), (33 N. Y. Supp. 947).

Vermont. *Fassett v. Roxbury*, 55 Vt. 552 (1883).

Wisconsin. *Fopper v. Wheatland*, 59 Wis. 623 (1884), (18 N. W. Rep. 514); *Weber v. Greenfield*, 74 Wis. 234 (1889), (42 N. W. Rep. 101).

If the statute requires it, the notice must state that the accident occurred upon a highway within the limits of the particular corporation which is sought to be charged with liability. *White v. Stowe*, 54 Vt. 510 (1881); *Farnsworth v. Mount Holly*, 63 Vt. 293 (1891), (22 Atl. Rep. 459).

³ *Rogers v. Shirley*, 74 Me. 144 (1882); *Larkin v. Boston*, 128 Mass. 521 (1880); *Post v. Foxborough*, 131 Mass. 202 (1881); *Donnelly v. Fall River*, 132 Mass. 299 (1882); *Currier v. Concord*, 68 N. H. 294 (1895), (44 Atl. Rep. 386); *Law v. Fairfield*, 46 Vt. 425 (1874); *Babcock v. Guilford*, 47 Vt. 519 (1875); *Sowle v. Tomah*, 81 Wis. 349 (1892), (51 N. W. Rep. 571).

⁴ See *White v. Vassalborough*, 82 Me. 67 (1889), (19 Atl. Rep. 99);

street,¹ or to any natural object.² But if there is an ambiguity upon the subject, the other statements contained in the notice may be considered in aid of the description of the place, and it is enough if the correct location of the defect can be determined from the communication taken as a whole.³

§ 143. The Statement of the Defect — Of the Cause of the Accident. — Whenever a statute requires a statement of the defect to be included in the notice of the accident, it is ordinarily sufficient to describe that condition of the highway which caused the injury with such clearness as to fairly indicate to the municipal authorities the particular defect of which complaint is made.⁴ If this be done, the fact that there was another defect, not referred to in the notice, which contributed to the injury, will not invalidate the notice given.⁵

Davis v. Rumney, 67 N. H. 591 (1891), (38 Atl. Rep. 18); *Ranney v. Sheffield*, 49 Vt. 191 (1876); *Harris v. Townshend*, 56 Vt. 716 (1883); *Salladay v. Dodgeville*, 85 Wis. 318 (1893), (55 N. W. Rep. 696).

“On the sidewalk in front of” a specified building means in the immediate front, and not across the street. *Cloughessey v. Waterbury*, 51 Conn. 405, 421 (1883).

¹ See *McCabe v. Cambridge*, 134 Mass. 484 (1883); *Sargent v. Lynn*, 138 Mass. 599 (1885).

² See *Welch v. Gardner*, 133 Mass. 529 (1882); *Robin v. Bartlett*, 64 N. H. 426 (1887), (13 Atl. Rep. 645); *Melendy v. Bradford*, 56 Vt. 148 (1883); *Wieting v. Millston*, 77 Wis. 523 (1890), (46 N. W. Rep. 879).

³ *Lowe v. Clinton*, 133 Mass. 526 (1882); *Sargent v. Lynn*, 138 Mass. 599 (1885); *Sowle v. Tomah*, 81 Wis. 349, 352 (1892), (51 N. W. Rep. 571).

⁴ *Lilly v. Woodstock*, 59 Conn. 219, 223 (1890), (22 Atl. Rep. 40); *Manning v. Same*, 59 Conn. 224 (1890), (22 Atl. Rep. 42); *Hubbard v. Fayette*, 70 Me. 121 (1879); *Wieting v. Millston*, 77 Wis. 523, 528 (1890), (46 N. W. Rep. 879); *Salladay v. Dodgeville*, 85 Wis. 318 (1893), (55 N. W. Rep. 696); *Benson v. Madison*, 101 Wis. 312 (1898), (77 N. W. Rep. 161).

⁵ *Ashborn v. Waterbury*, 70 Conn. 551 (1898), (40 Atl. Rep. 458); *Quinn v. Sempronius*, 33 N. Y. App. Div. 70 (1898), (53 N. Y. Supp. 325).

The designation of that state of facts which constitutes the alleged defect by reason of which the accident happened is a proper and sufficient statement of the cause of the injury, within the meaning of the provision of a statute which requires that item to be stated in a notice of the accident.¹ Under this rule it is not enough merely to say that the plaintiff was injured "by reason of a defect in the highway," — that is not a statement of the cause of the particular injury, but rather a statement of the general ground upon which municipal corporations are in every case liable for injuries suffered upon the highway.² But if the defect itself is properly described, it is not necessary that the notice should go further and state the cause of that defect,³ nor even allege that the condition of things described constituted a defect.⁴

§ 144. The Statement of the Injuries received — Of the Claim of Damages. — It is a sufficient compliance with a statutory provision requiring a description of the injuries sustained to be given in the notice of the accident, to name the part of the person affected and to describe the extent of the hurt in such a reasonably complete manner as a person of common intelligence would be capable of doing. Scientific precision or technical language is not required.⁵

¹ *Taylor v. Woburn*, 130 Mass. 494 (1881); *Aston v. Newton*, 134 Mass. 507 (1883); *Grogan v. Worcester*, 140 Mass. 227 (1885), (4 N. E. Rep. 230); *Davis v. Charlton*, 140 Mass. 422 (1886), (5 N. E. Rep. 473); *Young v. Douglas*, 157 Mass. 383 (1892), (32 N. E. Rep. 354); *Paddock v. Syracuse*, 61 Hun (N. Y.), 8, 11 (1891), (15 N. Y. Supp. 387).

² *Noonan v. Lawrence*, 130 Mass. 161 (1881); *McNulty v. Cambridge*, 130 Mass. 275 (1881); *Miles v. Lynn*, 130 Mass. 398 (1881); *Madden v. Springfield*, 131 Mass. 441 (1881); *Dalton v. Salem*, 131 Mass. 551 (1881). And see also *Bailey v. Everett*, 132 Mass. 441 (1882); *Maloney v. Cook*, 21 R. I. 471 (1899), (44 Atl. Rep. 692).

³ *Whitman v. Groveland*, 131 Mass. 553, 555 (1881).

⁴ *Savory v. Haverhill*, 132 Mass. 324, 326 (1882).

⁵ *Brown v. Southbury*, 53 Conn. 212 (1885), (1 Atl. Rep. 819);

The purpose of a provision requiring a statement in the notice of the accident of the claim of damages has been held to be simply to notify the corporation that damages are claimed. To come within the requirement of such a provision, therefore, it is enough if the injured person states in his notice that he makes a claim for damages for his injury. The damages need not be specified, nor need the amount claimed be specified.¹

§ 145. The Notice must be given within the Time Limit.

— The notice containing the required particulars of the accident must be given within the time specified in the statute: if given after the expiration of that time, no action for the injury can be maintained,² unless, it has been held, the person can show that by reason of the accident he was incapable of complying with the statutory requirement in this particular.³

Lilly v. Woodstock, 59 Conn. 219, 223 (1890), (22 Atl. Rep. 40); *Bradbury v. Benton*, 69 Me. 194 (1879); *Low v. Windham*, 75 Me. 113 (1883); *Goodwin v. Gardiner*, 84 Me. 278 (1892), (24 Atl. Rep. 816); *Robin v. Bartlett*, 64 N. H. 426 (1887), (13 Atl. Rep. 645). But this was not enough under the Vermont statute, where a statement of the effect of the injuries upon the health was required. *Nourse v. Victory*, 51 Vt. 275 (1878); *Pratt v. Sherburne*, 53 Vt. 370 (1881); *Fassett v. Roxbury*, 55 Vt. 552 (1883); *Willard v. Sherburne*, 59 Vt. 361 (1887), (8 Atl. Rep. 735).

¹ *Sawyer v. Naples*, 66 Me. 453, 455 (1876); *Morgan v. Lewiston*, 91 Me. 566, 571 (1898), (40 Atl. Rep. 545), distinguishing *Lord v. Saco*, 87 Me. 231 (1895), (32 Atl. Rep. 887); *Minick v. Troy*, 83 N. Y. 514, 516 (1881).

² *Veazie v. Rockland*, 68 Me. 511 (1878); *Mitchell v. Worcester*, 129 Mass. 525 (1880); *Fort Worth v. Shero*, 16 Tex. Civ. App. 487 (1897), (41 S. W. Rep. 704).

³ See *Webster v. Beaver Dam*, 84 Fed. Rep. 280 (1898), where it was held that an action might be maintained, although the notice was not given within the time required by law, it appearing that the injured person was so far disabled by the accident that she could not give the notice within the time limited, but that she did give it as soon as she was able.

In the Massachusetts statute provision is expressly made for giving

In reckoning the time specified in the statute, fractions of a day are disregarded.¹

§ 146. The Service of the Notice of the Accident.—When the officer of the corporation upon whom service of the notice of the accident is to be made is specified in the statute, it must be served upon that officer. In such cases, service upon another officer than the one specified in the statute is not such a compliance with the statutory requirement as to permit the maintenance of an action, although the officer upon whom the service was actually made was one of the principal officers of the corporation.²

As a general rule, where the manner of serving the notice is not prescribed in the statute, any manner of service that gets it into the hands of the specified officer of the corporation within the prescribed time is sufficient.³

the notice in cases where "from physical or mental incapacity it is impossible for the person injured to give the notice within the time provided." Pub. Sts. of Mass., 1882, ch. 52, § 21. As to what is "physical or mental incapacity" within the meaning of that provision, see Williams, Stat. Torts in Massachusetts, § 59.

¹ Giddings *v.* Ira, 54 Vt. 346, 350 (1882).

² Denver *v.* Sanlcey, 5 Col. App. 420, 423 (1895), (38 Pac. Rep. 1098); Taylor *v.* Woburn, 130 Mass. 494 (1881); Fort Worth *v.* Shero, 16 Tex. Civ. App. 487 (1897), (41 S. W. Rep. 704); Harris *v.* Fond du Lac, 104 Wis. 44 (1899), (80 N. W. Rep. 66).

³ Taylor *v.* Woburn, 130 Mass. 494 (1881); Wieting *v.* Millston, 77 Wis. 523, 527 (1890), (46 N. W. Rep. 879).

But where the statute required that the notice "shall be filed" with the corporation counsel, service by mail has been held to be insufficient. "That requirement imposes upon the claimant the duty of doing everything necessary to put the corporation counsel in physical possession of the notice so that it may be said to be on file with him — mailing is not the equivalent of filing required by the statute. Delivery by or on behalf of the claimant at the office in which the filing is to be made will alone satisfy the statute." Burford *v.* Mayor, etc. of New York, 26 N. Y. App. Div. 225, 226 (1898), (49 N. Y. Supp. 969).

In Sheehy *v.* Mayor, etc. of New York, 160 N. Y. 139 (1899), (54 N. E. Rep. 749), it was held that the provisions of Laws 1886, c. 572,

PART IV.

Evidence.

§ 147. The Experiences of other Persons at the same Place. — The weight of judicial opinion favors the rule that evidence of the happening of accidents to other persons while passing the alleged defective spot is competent upon the issue as to the existence of a defect in the highway at the point in question.¹ This rule is rested upon the ground that such testimony has a legitimate tendency

that no action should be maintained against a city for personal injuries unless notice of the intention to sue shall have been filed with the corporation counsel within six months after the cause of action accrued, was sufficiently complied with by a notice which, although it contained no express statement of an intention to sue, was entitled in the matter of the plaintiff against the city, and declared that the plaintiff claimed and demanded from the city damages for personal injuries, and was signed by the plaintiff by her attorneys, who gave their address as required on formal papers in legal proceedings.

¹ *Connecticut.* *House v. Metcalf*, 27 Conn. 631 (1858).

Georgia. *Augusta v. Hafers*, 61 Ga. 48, 51 (1878).

Illinois. *Aurora v. Brown*, 12 Ill. App. 122, 130 (1882).

Iowa. *Frohs v. Dubuque*, 109 Ia. 219 (1899), (80 N. W. Rep. 341).

Kansas. *Topeka v. Sherwood*, 39 Kan. 690, 695 (1888), (18 Pac. Rep. 933).

Michigan. *Lombar v. East Tawas*, 86 Mich. 14, 20 (1891), (48 N. W. Rep. 947). But see *Langworthy v. Green Township*, 88 Mich. 207, 215 (1891), (50 N. W. Rep. 130).

New Hampshire. *Cook v. New Durham*, 64 N. H. 419 (1887), (13 Atl. Rep. 650). But see *Hubbard v. Concord*, 35 N. H. 52, 59 (1857).

New York. *Quinlan v. Utica*, 11 Hun, 217 (1877), affirmed in 74 N. Y. 603 (1878); *Burns v. Schenectady*, 24 Hun, 10 (1881); *Fordham v. Gouverneur Village*, 160 N. Y. 541 (1899), (55 N. E. Rep. 290).

Vermont. *Kent v. Lincoln*, 32 Vt. 591, 597 (1860).

Washington. *Elster v. Seattle*, 18 Wash. 304 (1897), (51 Pac. Rep. 394).

to show that the particular part of the highway under consideration, when tested by actual use, was in an unsafe and improper condition.

But in Massachusetts and in some other states such experiences of third persons are treated by the courts as collateral facts which furnish no legal presumption as to the principal fact in dispute, and are held, therefore, not to be admissible in evidence.¹ In these latter states it is also held not to be competent for the defendant corporation to show that other persons than the plaintiff had passed and repassed the place alleged to be defective in safety;² nor to show that no accident had previously happened at the place of the alleged defect.³ And this rule of evidence is not altered by facts which show that

¹ *Maine.* Bremner *v.* Newcastle, 83 Me. 415 (1891), (22 Atl. Rep. 382).

Massachusetts. Collins *v.* Dorchester, 6 Cush. 396 (1850); Blair *v.* Pelham, 118 Mass. 420, 422 (1875).

Missouri. Goble *v.* Kansas City, 148 Mo. 470 (1899), (50 S. W. Rep. 84).

Virginia. Moore *v.* Richmond, 85 Va. 538, 539 (1888), (8 S. E. Rep. 387).

Wisconsin. Phillips *v.* Willow, 70 Wis. 6 (1887), (34 N. W. Rep. 731).

² *Indiana.* Bauer *v.* Indianapolis, 99 Ind. 56, 60 (1884).

Maine. Branch *v.* Libbey, 78 Me. 321 (1886), (5 Atl. Rep. 71).

Massachusetts. Aldrich *v.* Pelham, 1 Gray, 510 (1854); Kidder *v.* Dunstable, 11 Gray, 342 (1858); Schoonmaker *v.* Wilbraham, 110 Mass. 134 (1872).

But see Calkins *v.* Hartford, 33 Conn. 57 (1865).

³ *Marvin v.* New Bedford, 158 Mass. 464 (1893), (33 N. E. Rep. 605). But see Littlefield *v.* Norwich, 40 Conn. 406 (1873); Maxim *v.* Champion, 50 Hun, 88, 98 (1888), (4 N. Y. Supp. 515), affirmed in 119 N. Y. 626 (1890).

So where the defect relied on was the insufficient width of the highway, it was held incompetent for the plaintiff to show that other carriages had been unable to pass at the place of the accident, Merrill *v.* Bradford, 110 Mass. 505 (1872); or for the defendant town to show that other vehicles had met there and passed without difficulty, Aldrich *v.* Pelham, 1 Gray (Mass.), 510 (1854).

the condition of the highway had all the time remained unchanged.¹

§ 148. The Existence of Similar Defects in other Places. — The fact that conditions like those alleged, in the particular case, to constitute a defect in the highway existed in the highway somewhere else, obviously has no tendency to prove that such conditions did not constitute a defect, nor can they afford a defendant corporation any excuse for its own neglect of duty. Hence it is commonly held not to be competent for a municipal corporation to put in evidence tending to show either that its highway at the place where the accident happened was in the same condition as the highway in other municipalities,² or that places of the same character existed in other streets within its own limits.³

§ 149. The State of the Highway at other Times. — Evidence of the condition of the highway at a time prior to, or subsequent to, the happening of the accident in question is generally considered to be admissible upon the issue whether or not the highway was in a defective condition at the time when the injury was received, provided it is so near in point of time, or is accompanied by such

¹ Aldrich *v.* Pelham, 1 Gray (Mass.), 510 (1854); Merrill *v.* Bradford, 110 Mass. 505 (1872).

² Illinois. Champaign *v.* Patterson, 50 Ill. 61, 65 (1869).

Massachusetts. Kidder *v.* Dunstable, 11 Gray, 312 (1858); George *v.* Haverhill, 110 Mass. 506, 512 (1872); Marvin *v.* New Bedford, 158 Mass. 464 (1893), (33 N. E. Rep. 605). And see also Raymond *v.* Lowell, 6 Cush. 524 (1850).

Michigan. Malloy *v.* Walker Township, 77 Mich. 448, 465 (1889), (43 N. W. Rep. 1012).

New Hampshire. Hubbard *v.* Concord, 35 N. H. 52, 60 (1857).

³ Indiana. Bauer *v.* Indianapolis, 99 Ind. 56, 62 (1884).

Iowa. Weber *v.* Creston, 75 Ia. 16, 18 (1888), (39 N. W. Rep. 126).

Massachusetts. Bacon *v.* Boston, 3 Cush. 174, 181 (1849).

Michigan. Langworthy *v.* Green Township, 88 Mich. 207, 216 (1891), (50 N. W. Rep. 130).

New Hampshire. Rowell *v.* Hollis, 62 N. H. 129 (1882).

further facts, as to furnish a presumption that the condition had not changed meanwhile.¹ Thus, where the accident happened on Monday morning, evidence of the condition of the highway on the previous Saturday night was admitted.² And so evidence of the width of the highway at the place of the accident nine months after the injury was admitted, together with evidence tending to show that the width had remained unchanged during that time.³ How far either side of the day of the accident the limit shall extend is for the court, in the exercise of a reasonable discretion, to determine.⁴

§ 150. Resolutions or Reports of Municipal Authorities admissible to show Notice of the Defect. — The overwhelming weight of judicial opinion favors the rule that the official acts of the city or village council in the form of resolutions, reports or the like, done in regular session and within the scope of the powers conferred by charter or general laws, are competent evidence tending to show actual notice to the corporation of the existence of the alleged defect in the highway.⁵ This rule is rested upon

¹ *Bailey v. Centerville*, 108 Ia. 20 (1899), (78 N. W. Rep. 831); *Berrenberg v. Boston*, 137 Mass. 231 (1884); *Woodcock v. Worcester*, 138 Mass. 268 (1885); *Neal v. Boston*, 160 Mass. 518, 522 (1894), (36 N. E. Rep. 308); *Langworthy v. Green Township*, 88 Mich. 207, 212 (1891), (50 N. W. Rep. 130); *Coates v. Canaan*, 51 Vt. 131, 139 (1878).

² *Sheren v. Lowell*, 104 Mass. 24 (1870). And see *Daniels v. Lowell*, 139 Mass. 56 (1885), (29 N. E. Rep. 222).

³ *Brooks v. Petersham*, 16 Gray (Mass.), 181 (1860). See also *George v. Haverhill*, 110 Mass. 506 (1872).

⁴ *Neal v. Boston*, 160 Mass. 518, 522 (1894), (36 N. E. Rep. 308).

⁵ *Illinois*. *Chicago v. Powers*, 42 Ill. 169, 173 (1866).

Indiana. *Delphi v. Lowery*, 74 Ind. 520, 526 (1881).

Iowa. *Butler v. Malvern*, 91 Ia. 397 (1894), (59 N. W. Rep. 50).

Maine. *Bond v. Biddeford*, 75 Me. 538 (1884).

Michigan. *Thompson v. Quincy*, 83 Mich. 173 (1890), (47 N. W. Rep. 114).

Minnesota. *Erd v. St. Paul*, 22 Minn. 443 (1876).

Collins v. Dorchester, 6 *Cush.* (Mass.) 396 (1850), *Wheeler v.*

the familiar doctrine of agency that the authorized acts of the agent, done in the discharge of his agency, are competent to bind his principal.

§ 151. **The Experiences of other Persons admissible to show Notice of the Defect.** — The fact that similar accidents happened to persons other than the plaintiff at the same place is generally held to be admissible in evidence upon the issue of notice to the corporation of the existence of the defect that occasioned the injury.¹

Framingham, 12 *Cush.* (Mass.) 287 (1853), and *Dudley v. Weston*, 1 *Met.* (Mass.) 477 (1840), are sometimes cited as standing for a contrary rule, but in *Collins v. Dorchester* the trial court ruled that such evidence was admissible to show notice, and this ruling was not questioned. In each of those cases evidence of this character was held incompetent to show a defect in the highway — was not admissible as an admission on the part of the town that the highway at the point in question was defective. And in *Blake v. Lowell*, 143 Mass. 296 (1887), (9 N. E. Rep. 627), an entry made by a policeman prior to the accident, in a book kept for that purpose, stating the defective condition of the sidewalk at the place in question, was held to be admissible upon the issue of notice to the defendant city of the existence of the defect.

A written report of the street commissioner to the city council, as to the condition of the highway, made in the performance of his official duty, has been held competent to prove notice. *Bond v. Biddeford*, 75 Me. 538 (1884).

In *Trapnell v. Red Oak Junction*, 76 Ia. 744, 748 (1888), (39 N. W. Rep. 884), the testimony of a member of the city council to the effect that certain complaints as to the condition of the sidewalk in question had been made to the council, was held to be competent to show notice of the alleged defect.

¹ *Illinois.* *Chicago v. Powers*, 42 Ill. 169, 173 (1866).

Indiana. *Delphi v. Lowery*, 74 Ind. 520, 523 (1881).

Iowa. *Moore v. Burlington*, 49 Ia. 136 (1878).

Kansas. *Topeka v. Sherwood*, 39 Kan. 690, 695 (1888), (18 Pac. Rep. 933).

Michigan. *Alberts v. Vernon*, 96 Mich. 549 (1893), (55 N. W. Rep. 1022).

Minnesota. *Burrows v. Lake Crystal*, 61 Minn. 357 (1895), (63 N. W. Rep. 745).

Washington. *Elster v. Seattle*, 18 Wash. 304 (1897), (51 Pac.

Rep. 394); *Piper v. Spokane*, 22 Wash. 147 (1900), (60 Pac. Rep. 138).

Contra: *Blair v. Pelham*, 118 Mass. 420 (1875).

In *Weeks v. Needham*, 156 Mass. 289, 291 (1892), (31 N. E. Rep. 8), the statements of a surveyor of highways, or of a selectman, as to the condition of the highway, were held not to be admissions binding upon the town.

CHAPTER VII.

THE LIABILITY RELATIVE TO DRAINS AND SEWERS.

§ 152. **The Duty to provide Drainage.** — The duty of municipal corporations relative to the establishment of a system of drainage for their territory is not absolute in its nature. They cannot be compelled at the suit of a private individual to provide means for carrying off surface water or sewage from any particular locality.¹ The determination of a variety of questions, each of which requires the exercise of qualities of deliberation, judgment and discretion, is necessarily involved in providing public improvements of this kind. What section of the territory of the corporation shall be given the preference in the construction of such improvements? In what order of time shall the construction of them be carried on? What financial burdens may properly be assumed for the accomplishment of a work of this kind at any given time? Since these and like problems must be passed upon before the actual work of construction can begin, this duty is essentially of a legislative or quasi judicial character.² The rule has become well established, in accordance with the general principles of law relating to duties of such

¹ *Horton v. Nashville*, 4 Lea (Tenn.), 39 (1879). In this case it was held that a court of chancery had no power to compel a municipal corporation to exercise its judicial power relative to the matter of drainage and to construct a sewer in a particular direction.

² See *Montgomery v. Gilmer*, 33 Ala. 116, 131 (1858); *Cohurn v. Bossert*, 13 Ind. App. 359 (1895), (40 N. E. Rep. 281); *Mills v. Brooklyn*, 32 N. Y. 489, 495 (1865); *Lynch v. Mayor, etc. of New York*, 76 N. Y. 60 (1879); *Michener v. Philadelphia*, 118 Pa. St. 535, 540 (1888), (12 Atl. Rep. 174).

a nature, that a failure on the part of a municipal corporation to act affirmatively and to establish a system of drainage involves no liability at common law.¹ Any other rule must take from the legislative and deliberative branch of the municipal body, to which the provisions of the charter or general laws intrusted them, the determination of the numerous questions involved in the performance of this duty, and require in each case the submission of them to the judicial tribunal for revision: a result quite at variance with all principles of law relating to the exercise of legislative or quasi judicial power.

Furthermore, upon the same general principles, if a municipal corporation has made a provision for drainage which by reason of changed conditions has become useless or has been abandoned or discontinued, it is not liable at common law for a failure to provide new means for the accomplishment of the same end, nor responsible for damages resulting therefrom,² at least where the property

¹ *Alabama.* *Montgomery v. Gilmer*, 33 Ala. 116, 131 (1858).

Colorado. *Daniels v. Denver*, 2 Col. 669 (1875); *Denver v. Rhodes*, 9 Col. 554, 563 (1886), (13 Pac. Rep. 729).

Indiana. *Monticello v. Fox*, 3 Ind. App. 481, 487 (1891), (28 N. E. Rep. 1025).

Minnesota. *McClure v. Red Wing*, 28 Minn. 186, 194 (1881), (9 N. W. Rep. 767); *St. Paul, etc. R. Co. v. Duluth*, 56 Minn. 494, 500 (1894), (58 N. W. Rep. 159).

New York. *Wilson v. Mayor, etc. of New York*, 1 Den. 595, 598 (1845); *Mills v. Brooklyn*, 32 N. Y. 489, 495 (1865).

Ohio. *Springfield v. Spense*, 39 Oh. St. 665, 669 (1884).

Pennsylvania. *Carr v. Northern Liberties*, 35 Pa. St. 324 (1860).

West Virginia. *Jordan v. Benwood*, 42 W. Va. 312 (1896), (26 S. E. Rep. 266).

² *Atchison v. Challiss*, 9 Kan. 603, 613 (1872); *Henderson v. Minneapolis*, 32 Minn. 319, 324 (1884), (20 N. W. Rep. 322); *Springfield v. Spense*, 39 Oh. St. 665 (1884); *Carr v. Northern Liberties*, 35 Pa. St. 324, 330 (1860).

A case involving the abandonment of a sewer is to be distinguished, of course, from one involving a failure to repair. "The first is the exercise of that discretionary, or quasi judicial power, possessed by

owner is left in no worse condition than if no drain or sewer had been constructed and where no negligence on the part of the corporation is involved.¹

§ 153. When Municipal Corporations are bound to provide Drainage. — Municipal corporations have no right to collect sewage and deposit it in a body upon private property. Whenever, therefore, the system of drainage adopted leads to such a result, the corporation is bound to exercise reasonable care and skill to provide a proper outlet. Having created the necessity therefor, the duty devolves upon it to make reasonable provision for the escape of the sewage without injury to adjacent land-owners.²

The mere act of making street improvements, however, such as grading and paving, does not impose upon the corporation the absolute duty to construct drains and sewers, even though the result of such work is that surface water is prevented from flowing off from, or is caused to flow on to, if not in a body, the adjoining lots. The necessity created by such acts of the corporation is not such as to bring the case within the above rule.³

cities ; the second is the neglect to perform a ministerial duty.”
Atchison v. Challiss, 9 Kan. 603, 613 (1872).

¹ *Schroeder v. Baraboo*, 93 Wis. 95 (1896), (67 N. W. Rep. 27).

² *Evansville v. Decker*, 84 Ind. 325 (1882); *Crawfordsville v. Bond*, 96 Ind. 236 (1884) ; *Fort Wayne v. Coombs*, 107 Ind. 75 (1886), (7 N. E. Rep. 743); *Van Pelt v. Davenport*, 42 Ia. 308, 313 (1875); *Byrnes v. Cohoes*, 67 N. Y. 204 (1876); *Siefert v. Brooklyn*, 101 N. Y. 136 (1886), (4 N. E. Rep. 321); *Carll v. Northport*, 11 N. Y. App. Div. 120 (1896), (42 N. Y. Supp. 576). See also cases cited under § 159, *post*.

³ *Delaware. Magarity v. Wilmington*, 5 Honst. 530 (1879).

Iowa. Freburg v. Davenport, 63 Ia. 119 (1884), (18 N. W. Rep. 705).

Missouri. Foster v. St. Louis, 71 Mo. 157 (1879).

New York. Wilson v. Mayor, etc. of New York, 1 Den. 595 (1845); *Lynch v. Same*, 76 N. Y. 60 (1879).

Pennsylvania. Allentown v. Kramer, 73 Pa. St. 406 (1873).

Wisconsin. Waters v. Bay View, 61 Wis. 642 (1884), (21 N. W. Rep. 811).

For additional cases see § 164, *post*.

§ 154. The Liability growing out of the Plan of Drainage adopted. — It is obvious that the adoption of a general plan of drainage involves many and varied considerations affecting the public health and the general convenience of the community, the determination of each of which requires deliberate judgment and large discretion. The nature of the duty of municipal corporations in the premises is generally conceded to be distinctly judicial or quasi judicial. Hence the doctrine has come to be commonly accepted by the courts that whatever damages may result from defects in the plan of drainage adopted, are damages incident to the lawful exercise of their discretionary power, for which they cannot be held responsible at the suit of a private individual.¹ Whatever diversity

¹ *Arkansas.* Little Rock *v.* Willis, 27 Ark. 572 (1872).

Colorado. Denver *v.* Capelli, 4 Col. 25 (1877).

Delaware. Magarity *v.* Wilmington, 5 Houst. 530 (1879).

District of Columbia. Bannagan *v.* District of Columbia, 2 Mackey, 285 (1883).

Iowa. Van Pelt *v.* Davenport, 42 Ia. 308 (1875); Wicks *v.* De Witt, 54 Ia. 130 (1880), (6 N. W. Rep. 176).

Kansas. King *v.* Kansas City, 58 Kan. 334, 337 (1897), (49 Pac. Rep. 88).

Maine. Darling *v.* Bangor, 68 Me. 108 (1878); Attwood *v.* Bangor, 83 Me. 582 (1891), (22 Atl. Rep. 466).

Massachusetts. Child *v.* Boston, 4 Allen, 41, 51 (1862); Merrifield *v.* Worcester, 110 Mass. 216 (1872).

New York. Mills *v.* Brooklyn, 32 N. Y. 489 (1865); Garratt *v.* Canandaigua, 135 N. Y. 436 (1892), (32 N. E. Rep. 142).

Pennsylvania. Fair *v.* Philadelphia, 88 Pa. St. 309 (1879); Collins *v.* Same, 93 Pa. St. 272 (1880).

Vermont. Winn *v.* Rutland, 52 Vt. 481, 492 (1880).

Wisconsin. Champion *v.* Crandon, 84 Wis. 405 (1893), (54 N. W. Rep. 775).

A court of equity will not interfere by injunction with a plan of drainage adopted in good faith by the municipal authorities acting within the scope of their authority, where the injury therefrom is doubtful, eventual, or contingent. Morgan *v.* Binghamton, 102 N. Y.

may be found among the authorities as to the application of this rule to particular cases, there is great harmony among them as to the rule itself.

In Indiana this rule has been modified, on the ground that a distinction is to be made, in the matter of devising a plan of drainage, between errors of judgment and errors arising from negligence. While the courts in that state recognize the principle that municipal corporations are not responsible for damages due to the lawful exercise of their discretionary power to plan a system of drainage, they hold that its application is to be confined to such damages as are occasioned by mere errors of judgment made in the course of the exercise, in a reasonably prudent manner, of that power. In brief, then, the Indiana doctrine is that if damages due to the construction of drains or sewers result from an omission on its part to exercise due care and skill in devising the plans of them, the corporation is responsible;¹ but not, if such damages are attributable to a mere error of judgment.²

This rule of immunity from liability for the conse-
500, (1886), (7 N. E. Rep. 424); *Americus v. Eldridge*, 64 Ga. 524 (1880).

Where the damage to the plaintiff's premises was due to a failure to complete a sewer according to a plan adopted, it was held that the failure to carry out the plan was not a mere exercise of discretion which exempted the defendant city from liability, but was such negligence as to render it responsible. *Hardy v. Brooklyn*, 90 N. Y. 435 (1882).

¹ *Cummins v. Seymour*, 79 Ind. 491, 494 (1881); *Evansville v. Decker*, 84 Ind. 325 (1882); *Rice v. Evansville*, 108 Ind. 7, 9 (1886), (9 N. E. Rep. 139); *Seymour v. Cummins*, 119 Ind. 148, 152 (1889), (21 N. E. Rep. 549). See also *Harrigan v. Wilmington*, 8 Hous. (Del.) 140 (1888), (12 Atl. Rep. 779), which appears to favor a rule like that prevailing in Indiana.

² *Roll v. Indianapolis*, 52 Ind. 547 (1876); *Rozell v. Anderson*, 91 Ind. 591 (1883).

quences flowing from the exercise of the power to plan a system of drainage rests upon the assumption that such consequences are lawful. If this be not so, if the consequences are such as could not be lawfully authorized, then the immunity ceases and liability ensues. Thus, if the exercise of the power to plan a system of drainage results in a direct and physical injury to the property of a private citizen, which is likely to be continuous, such as the discharge upon his premises of a large body of surface water or sewage,¹ or the creation of a nuisance injurious thereto,² the municipality is liable for all damages occurring in consequence of the continuance, after notice, of the original cause, even though the drain or sewer was constructed in the most careful and skilful manner and strictly in accordance with the plans adopted.

§ 155. The Capacity of the Drain or Sewer. — While the rule of immunity from liability for damages due to defects in the plan of drainage adopted is generally extended to all the details, such as the determination of the location, level, capacity, and the like, in some jurisdictions it appears to be considered that municipal corporations do not act in their quasi judicial capacity in determining the dimensions of the drain or sewer. In such jurisdictions the rule is that if a municipality undertakes to provide drains or sewers it must exercise due care and skill to give them sufficient capacity to carry off not only the ordinary and usual quantity of water and sewage in ordinary times, but also that which, from experience and knowledge of the past, might reasonably be anticipated to

¹ *Tate v. St. Paul*, 56 Minn. 527 (1894), (58 N. W. Rep. 158); *Siefert v. Brooklyn*, 101 N. Y. 136 (1886), (4 N. E. Rep. 321). For additional cases see § 159, *post*.

² *Smith v. Atlanta*, 75 Ga. 110 (1885); *Edmondson v. Moberly*, 98 Mo. 523 (1889), (11 S. W. Rep. 990). And see cases cited under § 160, *post*.

accumulate.¹ If it has made provision to that extent for disposing of water and sewage, it will not be responsible for damages due to excessive and extraordinary storms which by the exercise of reasonable care and prudence could not be foreseen and guarded against.²

§ 156. The Liability growing out of the Work of Construction. — When the plans for proposed drains or sewers have been finally determined upon by the proper municipal officers, judicial duty comes to an end. The work of constructing them in accordance with the plans adopted

¹ *California.* Spangler *v.* San Francisco, 84 Cal. 12 (1890), (23 Pac. Rep. 1091).

Delaware. Harrigan *v.* Wilmington, 8 Houst. 140 (1888), (12 Atl. Rep. 779).

Illinois. Dixon *v.* Baker, 65 Ill. 518, 521 (1872); Aurora *v.* Love, 93 Ill. 521 (1879).

Indiana. Weis *v.* Madison, 75 Ind. 241, 251 (1881); Evansville *v.* Decker, 84 Ind. 325, 328 (1882).

Iowa. Powers *v.* Conncl Bluffs, 50 Ia. 197, 202 (1878); German Theological School *v.* Dubuque, 64 Ia. 736 (1883), (17 N. W. Rep. 153).

² *California.* Los Angeles Cemetery Ass'n *v.* Los Angeles, 103 Cal. 461 (1894), (37 Pac. Rep. 375).

Delaware. Hession *v.* Wilmington, 27 Atl. Rep. 830 (1893).

District of Columbia. District of Columbia *v.* Gray, 1 App. Cas. 500 (1893).

Iowa. German Theological School *v.* Dubuque, 64 Ia. 736 (1883), (17 N. W. Rep. 153).

North Carolina. Wright *v.* Wilmington, 92 N. C. 156 (1885).

Wisconsin. Allen *v.* Chippewa Falls, 52 Wis. 430 (1881), (9 N. W. Rep. 284).

See also Fairlawn Coal Co. *v.* Scranton, 148 Pa. St. 231 (1892), (23 Atl. Rep. 1069).

In Denver *v.* Rhodes, 9 Col. 554 (1886), (13 Pac. Rep. 729), it was held at page 564 that the proposition that no one is liable for damages caused by an unusual flood of rain, because there is no negligence in failing to provide therefor, "if correct in any class of circumstances," did not justify the total obstruction of a street so improved that no damage would have been suffered if proper passages had been left for the escape of the water.

is purely ministerial in character. There is great unanimity of opinion among the authorities upon this point, as well as upon the resulting rule that municipal corporations are bound to exercise reasonable care, skill and prudence in carrying on the actual work of constructing such improvements, and must respond in damages for any injury done to private property by the negligent or unskilful manner in which this duty is performed by them.¹

Alabama. *Montgomery v. Gilmer*, 33 Ala. 116, 130 (1858).

Colorado. *Denver v. Rhodes*, 9 Col. 554, 563 (1886), (13 Pac. Rep. 729).

Connecticut. *Judd v. Hartford*, 72 Conn. 350 (1899), (44 Atl. Rep. 510).

Delaware. *Hession v. Wilmington*, 27 Atl. Rep. 830 (1893).

Indiana. *Logansport v. Wright*, 25 Ind. 512 (1865); *Evansville v. Decker*, 84 Ind. 325, 327 (1882); *Seymour v. Cummins*, 119 Ind. 148 (1889), (21 N. E. Rep. 549).

Iowa. *Wallace v. Muscatine*, 4 Greene, 373 (1854); *Ellis v. Iowa City*, 29 Ia. 229 (1870).

Kansas. *King v. Kansas City*, 58 Kan. 334 (1897), (49 Pac. Rep. 88).

Maryland. *Frostburg v. Hitchins*, 70 Md. 56 (1888), (16 Atl. Rep. 380).

Massachusetts. *Merrifield v. Worcester*, 110 Mass. 216 (1872); *Stock v. Boston*, 149 Mass. 410 (1889), (21 N. E. Rep. 871).

Missouri. *Thurston v. St. Joseph*, 51 Mo. 510 (1873).

New Hampshire. *Rowe v. Portsmouth*, 56 N. H. 291 (1876).

New York. *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463 (1850); *Barton v. Syracuse*, 36 N. Y. 54 (1867); *Hardy v. Brooklyn*, 90 N. Y. 435, 440 (1882).

Texas. *Gross v. Lampasas*, 74 Tex. 195, 202 (1889), (11 S. W. Rep. 1086).

Vermont. *Winn v. Rutland*, 52 Vt. 481, 492 (1880).

United States. *Johnston v. District of Columbia*, 118 U. S. 19, 20 (1886), (6 S. Ct. Rep. 923).

The *New Jersey* rule is stated by Chief Justice Beasley in *Jersey City v. Kiernan*, 50 N. J. L. 246 (1888), at page 251, (13 Atl. Rep. 170), as follows: "The conclusion to which this court has finally come is this: That the defendant is not responsible for the consequences of a break in the sewer in question, *per se*, even though it be the result of the carelessness of its own agents, for the public is not

And the rule of liability is the same where a negligent manner of carrying on the work results in personal injury either to a private individual¹ or to an employee engaged upon the work,² unless other circumstances of the case afford the corporation a good defence.

§ 157. The Liability growing out of a Failure to repair. — The duty of municipal corporations relative to the maintenance of drains and sewers, when completed, like the

responsible for such misfeasance of its officers ; but when such break has occurred, occasioning a private nuisance exclusively, and the public authorities have been notified of the accident, we think that then they owe a duty to the individual to put the sewer in a proper condition, and that for the non-performance of such duty that an action will lie." In this case the break was due to faulty construction and failure to repair.

The measure of damages where the injury to property by the construction of drains or sewers is permanent is the diminution in value of the property by the improvement. *Maysville v. Stanton*, 14 S. W. Rep. 675 (Ky., 1890) ; *Plattsmouth v. Boeck*, 49 N. W. Rep. 167 (Neb., 1891) ; *Vanderslice v. Philadelphia*, 103 Pa. St. 102 (1888).

A lack of means to so construct the system of drainage that it shall be sufficient to protect all property owners from injury affords no defence, since there is no legal obligation resting upon the corporation to make such an improvement. *Frostburg v. Hitchins*, 70 Md. 56, 68 (1888), (16 Atl. Rep. 380).

Where the work of constructing a sewer was negligently prolonged and the street unnecessarily obstructed in consequence, to the injury of the plaintiff's business, it was held that he might recover whatever damages he could show to be due to said negligence. *Simmer v. St. Paul*, 23 Minn. 408 (1877). And see *Cummins v. Seymour*, 79 Ind. 491, 495 (1881).

¹ *Hickey v. Waltham*, 159 Mass. 460 (1893), (34 N. E. Rep. 681); *Detroit v. Corey*, 9 Mich. 165 (1861); *Lloyd v. Mayor, etc. of New York*, 5 N. Y. 369 (1851); *Turner v. Newburgh*, 109 N. Y. 301 (1888), (16 N. E. Rep. 344); *Dallas v. Webb*, 22 Tex. Civ. App. 48 (1899), (54 S. W. Rep. 398). *Contra* : *Chope v. Eureka*, 78 Cal. 588 (1889), (21 Pac. Rep. 364).

² *Coan v. Marlborough*, 164 Mass. 206 (1895), (41 N. E. Rep. 238); *Norton v. New Bedford*, 166 Mass. 48 (1896), (43 N. E. Rep. 1034); *Ostrander v. Lansing*, 111 Mich. 693 (1897), (70 N. W. Rep. 332); *Donahoe v. Kansas City*, 136 Mo. 657 (1896), (38 S. W. Rep. 571).

duty involved in the work of construction, is purely ministerial in character. Therefore, while not an insurer of their condition,¹ unless made so by some statutory provision,² a corporation is bound to use due care and vigilance to keep them clear and in a proper state of repair, and is responsible at common law if damages result from a failure on its part to so do.³

¹ *Fort Wayne v. Coombs*, 107 Ind. 75, 88 (1886), (7 N. E. Rep. 743).

² See *Blood v. Bangor*, 66 Me. 154 (1877), where it was held that the defendant city was made an insurer by the provisions of the statute upon which the action was based.

³ *California*. *Spangler v. San Francisco*, 84 Cal. 12 (1890), (23 Pac. Rep. 1091).

Colorado. *Denver v. Capelli*, 4 Col. 25 (1877); *Denver v. Rhodes*, 9 Col. 554 (1886), (13 Pac. Rep. 729).

Delaware. *Hession v. Wilmington*, 27 Atl. Rep. 830 (1893); *Harriigan v. Same*, 8 Houst. 140 (1888), (12 Atl. Rep. 779).

Georgia. *Savannah v. Spears*, 66 Ga. 304 (1881).

Illinois. *Alton v. Hope*, 68 Ill. 167 (1873); *Peoria v. Eisler*, 62 Ill. App. 26 (1895).

Indiana. *South Bend v. Paxon*, 67 Ind. 228, 235 (1879); *Valparaiso v. Cartwright*, 8 Ind. App. 429 (1893), (35 N. E. Rep. 1051).

Iowa. *Powers v. Council Bluffs*, 50 Ia. 197 (1878).

Kansas. *King v. Kansas City*, 58 Kan. 334 (1897), (49 Pac. Rep. 88).

Kentucky. *Louisville v. O'Malley*, 53 S. W. Rep. 287 (1899).

Massachusetts. *Child v. Boston*, 4 Allen, 41, 53 (1862); *Bates v. Westborough*, 151 Mass. 174 (1890), (23 N. E. Rep. 1070); *Allen v. Boston*, 159 Mass. 324 (1893), (34 N. E. Rep. 519). But see *Barry v. Lowell*, 8 Allen, 127 (1864).

Minnesota. *Taylor v. Austin*, 32 Minn. 247 (1884), (20 N. W. Rep. 157); *Netzer v. Crookston City*, 59 Minn. 244 (1894), (61 N. W. Rep. 21).

Missouri. *Woods v. Kansas City*, 58 Mo. App. 272 (1894).

New Hampshire. *Rowe v. Portsmouth*, 56 N. H. 291 (1876).

New York. *Mayor, etc. of New York v. Furze*, 3 Hill, 612 (1842); *Barton v. Syracuse*, 36 N. Y. 54 (1867); *McCarthy v. Syracuse*, 46 N. Y. 194 (1871).

Pennsylvania. *Vanderslice v. Philadelphia*, 103 Pa. St. 102 (1883).

Tennessee. *Horton v. Nashville*, 4 Lea, 39, 49 (1879).

Texas. *Dallas v. Shultz*, 27 S. W. Rep. 292 (1894); *Parker*

In the application of this rule of liability, it makes no difference by whom the drain or sewer in any particular case was constructed, provided it appears that the municipality has assumed and exercised control over it. Hence, even though built by a private individual, the corporation, by adopting it to the use of its public, will become responsible for its proper maintenance to the same extent as though constructed by its own agents.¹

v. Laredo, 9 Tex. Civ. App. 221, 224 (1894), (28 S. W. Rep. 1048).

Utah. Kiesel v. Ogden City, 8 Utah, 237 (1892), (30 Pac. Rep. 758).

Vermont. Haynes v. Burlington, 38 Vt. 350 (1865); *Winn v. Rutland*, 52 Vt. 481, 493 (1880).

Wisconsin. Harper v. Milwaukee, 30 Wis. 365 (1872).

United States. Johnston v. District of Columbia, 118 U. S. 19, 20 (1886), (6 S. Ct. Rep. 923).

The duty and liability are the same where the municipality adopts a natural stream as an open sewer: it must exercise ordinary care and diligence to keep the channel clear. *Blizzard v. Danville*, 175 Pa. St. 479 (1896), (34 Atl. Rep. 846); *Owens v. Lancaster*, 182 Pa. St. 257 (1897), (37 Atl. Rep. 858).

Municipal corporations are liable not only for neglecting to clean and repair drains and sewers, but also for cleaning or repairing them in a negligent manner. *Kranz v. Baltimore*, 64 Md. 491 (1885), (2 Atl. Rep. 908); *Chalkley v. Richmond*, 88 Va. 402 (1891), (14 S. E. Rep. 339).

In *Hession v. Wilmington*, 27 Atl. Rep. 830 (1893), it was held that a property owner was not entitled to recover damages even if the sewers were obstructed to such an extent that the water could not vent, if it appeared that the injury would have resulted just the same because the fall of rain was so extraordinary that the sewers, even if clear, could not have vented it, so as to prevent the damage.

The fact that a sewer is built on private property and that the corporation has no right to go thereon to make repairs, affords no defence to an action for damages caused by a failure to repair. *Netzer v. Crookston City*, 59 Minn. 244, 248 (1894), (61 N. W. Rep. 21).

¹ *Emery v. Lowell*, 104 Mass. 13 (1870); *Taylor v. Austin*, 32 Minn. 247 (1884), (20 N. W. Rep. 157); *Chalkley v. Richmond*, 88 Va. 402, 409 (1891), (14 S. E. Rep. 339); *Schroeder v. Baraboo*, 93 Wis. 95 (1896), (67 N. W. Rep. 27).

§ 158. **Notice to the Corporation of the Obstruction or Dilapidation must be shown.** — Since the liability growing out of the defective condition of drains and sewers rests entirely upon negligence, a municipal corporation is not responsible for damages due to their obstruction or dilapidation unless it has notice of the existence of such defect in time to remedy it before the injury is done.¹ This rule, however, must not be interpreted to mean necessarily that express notice must be brought home to the proper municipal authorities. As in the case of injuries due to defects in the highway, in the absence of proof of express notice, the burden imposed by this rule may still be sustained by showing facts from which the law will impute notice to the corporation. Thus, if it appears that the obstruction or dilapidation which caused the injury was open to observation and had existed for such a length of time that the corporate officers, by the exercise of reasonable diligence, might have known of the same, notice will be imputed to them.² And again, since the duty to clean and repair drains and sewers involves the exercise of a reasonable degree of active vigilance in ascertaining their condition from time to time, if the obstruction or dilapidation, though not open to ordinary observation, was a usual result of their use which might have been anticipated and guarded against by making an occasional examination and whatever repairs were found to be necessary, the omission to so do is a neglect of duty

¹ Knostman, etc. Furniture Co. v. Davenport, 99 Ia. 589, 597 (1896), (68 N. W. Rep. 887); Pottner v. Minneapolis, 41 Minn. 73 (1889), (42 N. W. Rep. 784).

² Fort Wayne v. Coombs, 107 Ind. 75, 78 (1886), (7 N. E. Rep. 743); Rowe v. Portsmouth, 56 N. H. 291 (1876). See also on the question of notice, Kranz v. Baltimore, 64 Md. 491, 498 (1885), (2 Atl. Rep. 908); Woods v. Kansas City, 58 Mo. App. 272 (1894).

which will render the corporation liable without proof of express notice.¹

Furthermore, if the existence of the defect that caused the injury was due to the acts of the officers or agents of the municipality, or to the acts of persons for whose action it was responsible, no notice at all need be shown.²

§ 159. The Liability growing out of the Discharge of Drains and Sewers — Where it amounts to a Taking of Private Property. — While the power to construct a system of drainage undoubtedly includes the right to find an outlet for its contents, that power cannot make it lawful for a municipal corporation to gather together surface water or sewage into a confined channel and to precipitate it in a body upon the land of a private person, even though the plan of drainage adopted was perfect and the work of construction was carried on with due care and skill. A municipality by such an act exceeds its lawful power, since the direct result of it is an invasion of the rights of the individual which amounts to a taking of his property for public use without compensation. It is thus in effect a violation of the organic law of the state, which no provision of charter or general statute can justify. Hence the rule seems to have become well settled that where the discharge of a drain or sewer is so arranged as necessarily to result in an injury to private property equivalent to the appropriation of some enjoyment of it, to which the owner

¹ *McCarthy v. Syracuse*, 46 N. Y. 194, 197 (1871); *Vanderslice v. Philadelphia*, 103 Pa. St. 102, 107 (1883).

The duty of municipal corporations requires them to take notice of the liability of timbers to decay from lapse of time and use, and to take such measures as ordinary care and skill dictate to guard against a sewer becoming unsafe because of the decay of timbers used in its construction. *Fort Wayne v. Coombs*, 107 Ind. 75, 88 (1886), (7 N. E. Rep. 743).

² *Nims v. Troy*, 59 N. Y. 500 (1875); *Kiesel v. Ogden City*, 8 Utah, 237 (1892), (30 Pac. Rep. 758).

is entitled, the corporation will be liable at common law.¹ And the rule is the same whether the surface water or sewage is discharged directly upon the plaintiff's land, or reaches there by force of gravitation.²

§ 160. The Liability growing out of the Discharge of Drains and Sewers — Where it creates a Nuisance. — The power granted to municipal corporations to dispose of sewage is subject to the further limitation that it must not be so exercised as to create a nuisance injurious to

¹ *Illinois.* *Jacksonville v. Lambert*, 62 Ill. 519 (1872).

Indiana. *Evansville v. Decker*, 84 Ind. 325 (1882).

Kansas. *King v. Kansas City*, 58 Kan. 334 (1897), (49 Pac. Rep. 88).

Massachusetts. *Woodward v. Worcester*, 121 Mass. 245 (1876).

Michigan. *Ashley v. Port Huron*, 35 Mich. 296 (1877).

Minnesota. *Tate v. St. Paul*, 56 Minn. 527 (1894), (58 N. W. Rep. 158).

New York. *Siefert v. Brooklyn*, 101 N. Y. 136 (1886), (4 N. E. Rep. 321); *Magee v. Brooklyn*, 18 N. Y. App. Div. 22 (1897), (45 N. Y. Supp. 473); *Huffmire v. Brooklyn*, 22 N. Y. App. Div. 406 (1897), (48 N. Y. Supp. 132).

Vermont. *Winn v. Rutland*, 52 Vt. 481, 494 (1880).

Where, by reason of the building of a sewer too near the plaintiff's property, the buildings thereon settled, cracking the walls and doing permanent damage, it was held that the plaintiff might recover by virtue of a constitutional provision that no property shall be taken or damaged for public use without compensation. *Reardon v. San Francisco*, 66 Cal. 492 (1885), (6 Pac. Rep. 317); *Plattsmouth v. Boeck*, 49 N. W. Rep. 167 (Neb., 1891).

Upon the principle stated in the text municipal corporations have been held liable at common law for depositing from drains or sewers dirt and gravel in a mill race. *Elgin Hydraulic Co. v. Elgin*, 74 Ill. 433 (1874). See also *Columbus v. Woolen Mills Co.*, 33 Ind. 435 (1870). And so also for discharging mud and filth into a private dock. *Haskell v. New Bedford*, 108 Mass. 208, 215 (1871); *Butchers', etc. Ice Co. v. Philadelphia*, 156 Pa. St. 54 (1893), (27 Atl. Rep. 376); *Clark v. Peckham*, 9 R. I. 455 (1870). And again where poisonous sewage was poured on to the plaintiff's oyster bed. *Huffmire v. Brooklyn*, 22 N. Y. App. Div. 406 (1897), (48 N. Y. Supp. 132).

² *Woodward v. Worcester*, 121 Mass. 245 (1876).

the rights of private citizens, unless, perhaps, that consequence is a necessary result of the exercise of such power.¹ Hence the general rule of law is that a municipality cannot deposit from its drains or sewers noxious substances, which render the air offensive and unwholesome, where they will endanger the life or health of private persons and impair the enjoyment of their property, and still be free from liability. Indeed, an action may generally be maintained against a municipal corporation for private injuries occasioned by a nuisance of this kind in any case where, under like circumstances, an action could be maintained against a private individual.²

§ 161. The Abandonment or Discontinuance of Drains or Sewers. — The abandonment or discontinuance of drains

¹ "When the Legislature authorizes a city or town to construct sewers, or to use a natural stream as a sewer, it is not to be assumed that it intends to authorize the city or town so to construct its sewers, or so to use the stream, as to create a nuisance, unless this is the necessary result of the powers granted. On the contrary, if it is practicable to do the work authorized without creating a nuisance, it is to be presumed that the Legislature intended that it should be so done." Chief Justice Morton in *Morse v. Worcester*, 139 Mass. 389 (1885), at page 391, (2 N. E. Rep. 694).

² *Connecticut.* *Morgan v. Danbury*, 67 Conn. 484 (1896), (35 Atl. Rep. 499).

Georgia. *Hamilton v. Columbus*, 52 Ga. 435 (1874); *Smith v. Atlanta*, 75 Ga. 110 (1885).

Illinois. *Jacksonville v. Doan*, 145 Ill. 23 (1893), (33 N. E. Rep. 878); *Bloomington v. Costello*, 65 Ill. App. 407 (1895).

Massachusetts. *Bacon v. Boston*, 154 Mass. 100 (1891), (28 N. E. Rep. 9).

Missouri. *Edmondson v. Moberly*, 98 Mo. 523 (1889), (11 S. W. Rep. 990).

New York. *Chapman v. Rochester*, 110 N. Y. 273 (1888), (18 N. E. Rep. 88); *Moody v. Saratoga Springs*, 17 N. Y. App. Div. 207 (1897), (45 N. Y. Supp. 365).

Rhode Island. *Clark v. Peckham*, 10 R. I. 35 (1871).

Wisconsin. *Harper v. Milwaukee*, 30 Wis. 365 (1870).

United States. *Carmichael v. Texarkana*, 94 Fed. Rep. 561 (1899).

or sewers by a municipal corporation, with the intention never to use them again, is simply a second or further exercise of that same power which in the first exercise resulted in the construction of them. It is in fact only a redetermination of the original question of the necessity of the particular drain or sewer. The action is thus essentially of a legislative or quasi judicial character, and as such comes within the general rule of immunity for the consequences of such action. Hence the rule has become established that municipal corporations are not responsible at common law for consequential damages resulting therefrom to a private person.¹

It has been intimated that there might be a liability resting upon the corporation in case, as a result of the abandonment or discontinuance, the individual was left in a worse position than if no drain or sewer had ever been constructed.² But it is difficult to see how, on principle, there can be any liability in such a case unless the result of the action is the creation of a private nuisance or the taking without compensation of some property interest belonging to the individual. However that may prove to be, it has been held that there is a liability where a municipal corporation abandons or discontinues a drain or sewer in a negligent manner, in consequence of which a private person suffers an injury.³

A case where the injury occurs by reason of the abandonment or discontinuance of a drain or sewer with the

¹ *Atchison v. Challiss*, 9 Kan. 603, 613 (1872); *Henderson v. Minneapolis*, 32 Minn. 319 (1884), (20 N. W. Rep. 322); *Springfield v. Spense*, 39 Oh. St. 665 (1884); *Carr v. Northern Liberties*, 35 Pa. St. 324 (1860); *Waters v. Bay View*, 61 Wis. 642 (1884), (21 N. W. Rep. 811).

² See *Atchison v. Challiss*, 9 Kan. 603, 613 (1872); *Waters v. Bay View*, 61 Wis. 642 (1884), (21 N. W. Rep. 811).

³ *Schroeder v. Baraboo*, 93 Wis. 95 (1896), (67 N. W. Rep. 27).

intention never again to use it is, of course, to be distinguished from one where the damage is due to the failure of the corporation to clean or to repair the drain or sewer. "The first is the exercise of that discretionary, or quasi judicial power, possessed by cities; the second is the neglect to perform a ministerial duty." While ordinarily there is no liability in the first case, there is in the second case.¹

¹ See § 157, *ante*.

As to the application of the doctrine of contributory negligence to cases where the injury is due to the construction or maintenance of drains or sewers, see *Parker v. Laredo*, 9 Tex. Civ. App. 221 (1894), (28 S. W. Rep. 1048), where it was held that a plaintiff who knew of the obstruction of the sewer and yet took no steps to notify the corporation or to prevent the injury was guilty of contributory negligence; *Netzer v. Crookston City*, 59 Minn. 244, 251 (1894), (61 N. W. Rep. 21), where it was held to be a question for the jury whether the failure of the plaintiff to attach proper valves to the drain was guilty of contributory negligence. See also *Barry v. Lowell*, 8 Allen (Mass.), 127 (1864); *Simpson v. Keokuk*, 34 Ia. 568 (1872).

CHAPTER VIII.

THE LIABILITY RELATIVE TO WATERS.

PART I.

Surface Waters.

§ 162. The State of the Law governing the Subject. — The law relating to the liability of municipal corporations for injuries to private property caused by surface water is left in an unsatisfactory state by the adjudicated cases. Indeed there is such a want of harmony among them that there appears to be some doubt as to the exact law governing some of the questions relating to the subject. This want of harmony and consequent uncertainty are due not merely to the difficulties inherent in this particular branch of the law, which are considerable, but also to the fact that two radically different doctrines regarding surface waters prevail, some states having adopted what is known as the civil law rule, and others the so-called common law rule. But, while many of the decisions cannot be reconciled, certain broad general principles may be pointed out which seem to have become fairly well settled by the weight of judicial authority.

§ 163. The Rule of the Civil Law. — The doctrine of the civil law rule is that, by reason of the natural situation of the land and of the necessity of affording an escape for the surface waters that accumulate thereon, the lower of two adjoining estates is subject to a natural easement or servitude of drainage in favor of the higher estate. The

burden thus imposed upon the lower or servient estate extends, however, only to such waters as naturally drain upon it from the upper or dominant estate. Hence, while the servient estate is bound to receive all water that naturally flows upon it from the dominant estate, it cannot be required to receive in addition such surface water as would, if left to itself, flow in other directions.

In jurisdictions where this doctrine prevails, it is applied to municipal corporations practically to the same extent as to private persons. Hence in such jurisdictions the rule is that a municipality cannot so grade or otherwise improve its highways as to cause surface water to flow in an increased quantity, or in a different manner, upon the land of a private individual, and escape liability for the damage resulting therefrom.¹

§ 164. The Rule of the Common Law. — According to the rule of the common law there is no such natural easement or servitude of drainage for surface water as the civil law recognizes and enforces. But its doctrine is that such water is to be regarded, not as a natural burden which the proprietor of the servient estate must bear, but

¹ *Georgia.* Albany *v.* Sikes, 94 Ga. 30 (1894), (20 S. E. Rep. 257).

Illinois. Bloomington *v.* Brokaw, 77 Ill. 194 (1875); Keithsburg *v.* Simpson, 70 Ill. App. 467 (1896).

Iowa. Holmes *v.* Calhoun County, 97 Ia. 360 (1896), (66 N. W. Rep. 145); Podhaisky *v.* Cedar Rapids, 106 Ia. 543 (1898), (76 N. W. Rep. 847); Schrope *v.* Pioneer Township, 82 N. W. Rep. 466 (1900).

Louisiana. Bowman *v.* New Orleans, 27 La. An. 501 (1875).

United States. Arn *v.* Kansas City, 4 McCrary, 558 (1882), (14 Fed. Rep. 236).

In Iowa are also to be found cases which hold that a corporation is not liable for turning surface water from its highways upon the land of an abutting property owner, if the latter has permitted his land to remain below grade. Freburg *v.* Davenport, 63 Ia. 119 (1884), (18 N. W. Rep. 705); Morris *v.* Council Bluffs, 67 Ia. 343 (1885), (25 N. W. Rep. 274); Gilfeather *v.* Council Bluffs, 69 Ia. 310 (1886), (28 N. W. Rep. 610).

rather as a common enemy which every proprietor of an estate may, in the necessary improvement of his land, fight as best he may. Hence each has a right to repel or divert the natural flow of surface water so far as may be required in order to carry out necessary and proper improvements, without incurring any liability to adjoining property owners for the injuries caused thereby.

The exemption from liability afforded by this rule is extended to municipal corporations the same as to individuals. They are not answerable at common law, therefore, if, as a result of grading or otherwise improving their public ways in a proper manner and under a lawful authority,¹ surface water is so diverted from its natural course as to flow upon the land of an adjoining proprietor in different places or in somewhat greater quantities,² or is so repelled as to prevent it from flowing off from the land of such proprietor in its accustomed channels.³

There are numerous cases belonging to this class to be

¹ If a municipal corporation acts without lawful authority in making the improvement that caused the surface water to accumulate upon the plaintiff's premises, it will be liable for the injury occasioned thereby. *Addy v. Janesville*, 70 Wis. 401, 406 (1888), (35 N. W. Rep. 931).

² *Connecticut*. *Byrne v. Farmington*, 64 Conn. 367 (1894), (30 Atl. Rep. 138).

District of Columbia. *Herring v. District of Columbia*, 3 Mackey, 572 (1885).

Maine. *Gardiner v. Camden*, 86 Me. 377 (1894), (30 Atl. Rep. 13).

Massachusetts. *Parks v. Newburyport*, 10 Gray, 28 (1857); *Flagg v. Worcester*, 13 Gray, 601 (1859).

Minnesota. *Alden v. Minneapolis*, 24 Minn. 254 (1877).

Nebraska. *Churchill v. Beethe*, 48 Neb. 87 (1896), (66 N. W. Rep. 992).

Rhode Island. *Wakefield v. Newell*, 12 R. I. 75 (1878); *Smith v. Tripp*, 13 R. I. 152 (1880).

Wisconsin. *Hoyt v. Hudson*, 27 Wis. 656 (1871).

³ *Henderson v. Minneapolis*, 32 Minn. 319, 324 (1884), (20 N. W. Rep. 322); *Follmann v. Mankato*, 45 Minn. 457 (1891), (48 N. W.

found in the books in which the result of the decision is the same as that reached under the above rule governing surface waters, but which are based upon an entirely different and broader ground. The underlying principle of such cases is the settled and familiar one that if in the proper exercise by a municipal corporation of its power to grade and improve its highways consequential damage results to a private person, such as the collection of surface water upon his premises, it is simply a necessary result of the performance of a legislative or judicial duty and is to be treated as *damnum absque injuria*, unless expressly declared otherwise by charter or statutory provision.¹

Rep. 192); *Lynch v. Mayor, etc. of New York*, 76 N. Y. 60 (1879); *Jordan v. Benwood*, 42 W. Va. 312 (1896), (26 S. E. Rep. 266); *Waters v. Bay View*, 61 Wis. 642 (1884), (21 N. W. Rep. 811). This appears to be the rule in California also, although the civil law rule prevails in that State. *Corcoran v. Benicia*, 96 Cal. 1 (1896), (30 Pac. Rep. 798); *Lampe v. San Francisco*, 124 Cal. 546 (1899), (57 Pa. Rep. 461, 1001).

¹ *Connecticut*. *Bronson v. Wallingford*, 54 Conn. 513 (1887), (9 Atl. Rep. 393). And see *Judge v. Meriden*, 38 Conn. 90 (1871), as treated in *Mootry v. Danbury*, 45 Conn. 550, 557 (1878).

Delaware. *Clark v. Wilmington*, 5 Harr. 243 (1849).

Georgia. *Roll v. Augusta*, 34 Ga. 326 (1866).

Indiana. *Davis v. Crawfordsville*, 119 Ind. 1 (1888), (21 N. E. Rep. 449).

Maryland. *Cumberland v. Willison*, 50 Md. 138, 149 (1878).

Minnesota. *Lee v. Minneapolis*, 22 Minn. 13 (1875).

Missouri. *Imler v. Springfield*, 55 Mo. 119 (1874); *Foster v. St. Louis*, 71 Mo. 157 (1879); *Stewart v. Clinton*, 79 Mo. 603, 612 (1883).

New Jersey. *Union v. Durkes*, 38 N. J. L. 21 (1875); *Miller v. Morristown*, 47 N. J. Eq. 62, 64 (1890), (20 Atl. Rep. 61).

New York. *Wilson v. Mayor, etc. of New York*, 1 Den. 595 (1845); *Kavanagh v. Brooklyn*, 38 Barb. 232 (1862); *Watson v. Kingston*, 114 N. Y. 88 (1889), (21 N. E. Rep. 102).

Oregon. *Bush v. Portland*, 19 Oreg. 45 (1890), (23 Pac. Rep. 667).

Pennsylvania. *Allentown v. Kramer*, 73 Pa. St. 406 (1873).

Vermont. *Noble v. St. Albans*, 56 Vt. 522 (1884).

Wisconsin. *Heth v. Fond du Lac*, 63 Wis. 228 (1885), (23 N. W. Rep. 495).

§ 165. **Where the Natural Flow of Surface Water is changed through Negligence.** — The exemption from liability for injuries occasioned by surface waters, which the doctrines of the common law extend to municipal corporations, presupposes that the acts done by them which caused the damage were done in a careful and skilful manner. If the facts of any particular case are such that this supposition cannot be indulged; if the waters have been caused to accumulate upon the land of a private person through the negligence or unskilfulness of the corporation in making the contemplated improvement, it must answer at common law for the damage so done. And this is the rule upon whichever doctrine of the common law the decision goes.

Thus, if appeal is made to the common law rule governing surface waters, that is found to be subject to another common law rule which requires each property owner to so use his own as not unnecessarily or negligently to injure that of another. Hence it follows that while a municipality may lawfully do whatever is necessary and proper to improve its highways, yet if there is a failure on its part to use due care and skill in the manner of doing the work or in maintaining it after it is done, and such failure is the proximate cause of the flowing of surface water on to the premises of an adjoining proprietor, it is accountable at common law for the damage so done.¹

And so if immunity from liability is sought under the broader common law principles regarding the consequential damages resulting from a lawful work, that rule also will be found to be subject to the exception, as familiar and as well settled as the rule itself, that, in the actual work of grading, draining, and otherwise improving their

¹ *Pye v. Mankato*, 36 Minn. 373, 374 (1887), (31 N. W. Rep. 863); *Kearney v. Themanson*, 48 Neb. 74 (1896), (66 N. W. Rep. 996).

public ways, municipal corporations are responsible in damages at common law for any injuries to private property by surface water due to the negligent or unskilful manner in which such work was done or in which the improvement when completed was maintained.¹

It seems that a similar rule of liability prevails also in those jurisdictions where the civil law doctrine regarding surface waters has been adopted.²

§ 166. Where Surface Waters are collected and cast in a Body upon Private Property.— Whatever differences of opinion may exist between the courts of the various states regarding the responsibility of municipal corporations for interfering with the natural flow of surface waters in the course of grading, draining, or otherwise improving their highways under a power conferred upon them by charter or general laws, there is substantial agreement among the authorities upon the proposition that they cannot collect such water from a large area by means of artificial channels and precipitate it in a body, with destructive force, upon the land of a private person, and escape liability at

¹ *Colorado.* *Denver v. Rhodes*, 9 Col. 554, 564 (1886), (13 Pac. Rep. 729).

Maryland. *Hitchins v. Frostburg*, 68 Md. 100, 110 (1887), (11 Atl. Rep. 826).

Massachusetts. *Emery v. Lowell*, 104 Mass. 13 (1870).

Michigan. *Defer v. Detroit*, 67 Mich. 346 (1887), (34 N. W. Rep. 680); *Seaman v. Marshall*, 116 Mich. 327, (1898), (74 N. W. Rep. 484).

Missouri. *Thurston v. St. Joseph*, 51 Mo. 510 (1873).

New Hampshire. *Parker v. Nashua*, 59 N. H. 402 (1879).

Pennsylvania. *Allentown v. Kramer*, 73 Pa. St. 406 (1873).

Texas. *Comanche v. Zettlemoyer*, 40 S. W. Rep. 641 (1897).

Virginia. *Smith v. Alexandria*, 33 Gratt. 208 (1880).

Wisconsin. *Gilluly v. Madison*, 63 Wis. 518 (1885), (24 N. W. Rep. 137). But see *Champion v. Crandon*, 84 Wis. 405, 412 (1893), (54 N. W. Rep. 775).

² *Eufaula v. Simmons*, 86 Ala. 515, 518 (1888), (6 So. Rep. 47); *Lehn v. San Francisco*, 66 Cal. 76 (1884), (4 Pac. Rep. 965); *Ross v. Clinton*, 46 Ia. 606, 609 (1877).

common law for the damage so done.¹ And it does not alter this result that the work was done under ample

¹ *Alabama.* *Troy v. Coleman*, 58 Ala. 570 (1877); *Eufaula v. Simmons*, 86 Ala. 515 (1888), (6 So. Rep. 47).

California. *Stanford v. San Francisco*, 111 Cal. 198 (1896), (43 Pac. Rep. 605).

Connecticut. *Danbury, etc. R. Co. v. Norwalk*, 37 Conn. 109 (1870).

Georgia. *Maguire v. Cartersville*, 76 Ga. 84 (1885).

Indiana. *Weis v. Madison*, 75 Ind. 241 (1881); *Crawfordsville v. Bond*, 96 Ind. 236 (1884); *Rice v. Evansville*, 108 Ind. 7, 12 (1886), (9 N. E. Rep. 139); *New Albany v. Lines*, 21 Ind. App. 380, 388 (1898), (51 N. E. Rep. 346).

Kansas. *King v. Kansas City*, 58 Kan. 334, 338 (1897), (49 Pac. Rep. 88).

Maryland. *Hitchius v. Frostburg*, 68 Md. 100 (1887), (11 Atl. Rep. 826).

Massachusetts. *Brayton v. Fall River*, 113 Mass. 218, 226 (1873); *Manning v. Lowell*, 130 Mass. 21 (1880).

Michigan. *Pennoyer v. Saginaw*, 8 Mich. 534 (1860); *Ashley v. Port Huron*, 35 Mich. 296 (1877).

Minnesota. *O'Brien v. St. Paul*, 18 Minn. 176 (1872); *Pye v. Mankato*, 36 Minn. 373 (1887), (31 N. W. Rep. 863); *Tate v. St. Paul*, 56 Minn. 527 (1894), (58 N. W. Rep. 158).

Missouri. *Rychlicki v. St. Louis*, 98 Mo. 497 (1889), (11 S. W. Rep. 1001).

New Hampshire. *Vale Mills v. Nashua*, 63 N. H. 136 (1884).

New Jersey. *Miller v. Morristown*, 47 N. J. Eq. 62, 66 (1890), (20 Atl. Rep. 61).

New York. *Byrnes v. Cohoes*, 67 N. Y. 204 (1876); *Noonan v. Albany*, 79 N. Y. 470 (1880); *Daggett v. Cohoes*, 7 N. Y. Supp. 882 (1889); *Bedell v. Sea Cliff*, 18 N. Y. App. Div. 261 (1897), (46 N. Y. Supp. 226).

Ohio. *Rhodes v. Cleveland*, 10 Oh. 159 (1840).

Pennsylvania. *Elliott v. Oil City*, 129 Pa. St. 570 (1889), (18 Atl. Rep. 553); *Torrey v. Scranton*, 133 Pa. St. 173 (1890), (19 Atl. Rep. 351); *Bohan v. Avoca Borough*, 154 Pa. St. 404 (1893), (26 Atl. Rep. 604).

Rhode Island. *Inman v. Tripp*, 11 R. I. 520 (1877); *King v. Granger*, 21 R. I. 93 (1898), (41 Atl. Rep. 1012).

Tennessee. *Burton v. Chattanooga*, 7 Lea, 739 (1881).

Texas. *Houston v. Bryan*, 2 Tex. Civ. App. 553 (1893), (22 S. W. Rep. 231).

Vermont. *Winn v. Rutland*, 52 Vt. 481, 494 (1880); *Whipple v. Fair Haven*, 63 Vt. 221 (1890), (21 Atl. Rep. 533).

West Virginia. *Gillison v. Charleston*, 16 W. Va. 282 (1880);

authority, according to the plans adopted by the proper municipal authorities, and in a careful and skilful manner. Nor does it make any difference in the application of this rule of liability whether such body of water is conducted directly to, and is cast upon, the premises of the citizen, or reaches them by being set back.¹ In any case the act of precipitating a body of surface water upon private premises is nothing less than a positive invasion of the rights of private property, against which the fundamental law of the state guarantees protection.

PART II.

Watercourses.

§ 167. The Distinction between Surface Waters and Watercourses — Its Importance. — To constitute a watercourse, it is essential that there should be a stream of water flowing in a definite channel, with bed and sides or banks, which discharges itself into some other stream or body of water. It is generally conceded, however, that the flow need not be continual: the bed at times may be dry; but there must be present ordinarily and usually a moving stream of water.²

Jordan v. Benwood, 42 W. Va. 312, 318 (1896), (26 S. E. Rep. 266).

Wisconsin. Pettigrew v. Evansville, 25 Wis. 223 (1870).

¹ *Tate v. St. Paul*, 56 Minn. 527 (1894), (58 N. W. Rep. 158).

² In *Weis v. Madison*, 75 Ind. 241 (1881), at page 253, Mr. Justice Elliott has given the following definition of a watercourse: "A watercourse is a stream of water ordinarily flowing in a certain direction, through a defined channel, with bed and banks. It is not necessary that the water should flow continually; the channel may sometimes be dry. There must, however, always be substantial indications of the existence of a stream, which is ordinarily and most frequently a moving body of water." And in *Stanchfield v. Newton*, 142 Mass. 110, 116 (1886), (7 N. E. Rep. 703), this instruction of the trial judge was approved: "To constitute a watercourse, water must usually flow in a

As the subject is generally treated by the courts, the distinction between watercourses and surface waters is made to turn upon the presence or absence of the essential characteristics of a watercourse, namely, the existence of a defined channel, with bed and banks, in which there is usually a moving body of water: if these characteristics are present, the body of water is commonly treated as a watercourse and is governed by the law applicable to such waters; if they are absent, the body of water is considered to be surface water and is governed by the law peculiar to such waters.

As is apparent on examination, the law relating to watercourses differs in many respects from that regarding surface waters, the powers of property owners over the latter commonly being much greater than over the former. Hence in considering the liability of municipal corporations for injuries to private property done in the course of grading, draining, or otherwise improving their highways by an interference with the natural flow of water, it is very important to distinguish between these two kinds of waters.

§ 168. Corporations not liable for Consequential Damages resulting from Improvements made in Watercourses. — The immunity from liability which the rule of the common law extends to municipal corporations for the mere consequential damages that result from a public improvement,

certain direction, and by a regular channel, with banks and sides. It may be dry at times, but it must have a well-defined and substantial existence. To constitute a watercourse, there must be something more than a mere surface drainage over one tract of land on to another, occasioned by unusual freshets or other extraordinary causes. The flowing, through a ditch, of water which has accumulated from rains, or the melting of snow, or the under-drainage of land, would not constitute a natural watercourse."

"Ravines, through which surface water runs in times when there are heavy rainfalls, are not natural watercourses." *Weis v. Madison*, 75 Ind. 241, 257 (1881).

made under lawful authority and with due care and skill, applies also to such improvements as they may make in a watercourse. Thus, where a city made a canal to straighten the channel of a river, doing the work under special authority and without negligence, in consequence of which the premises of a riparian proprietor were so far deprived of the protection which they formerly had that in times of storm the waters were driven back upon his land and injured his buildings, it was held not to be answerable for the damage so done in the absence of any provision of its charter or of the general statutes expressly creating the liability. At common law such injury must be treated as *damnum absque injuria*.¹

§ 169. The General Duties and Liabilities relative to Watercourses. — The duties and liabilities of municipal corporations regarding natural streams, in the absence of a valid legislative authority changing what would otherwise be their legal rights, are practically the same as those of a private corporation or natural person under like circumstances. Thus they have a right to make a proper and reasonable use of a natural stream which flows through their territory, such as to carry off the surface wash from their streets which naturally finds its way into the stream, even though the result is that increased amounts of soil are carried into, and obstruct, the channel, causing the water at times to set back upon the land of a private individual.² But if they adopt the stream as an open sewer, it becomes their duty to use due care to keep the channel clear; and they are bound to respond in damages to a person whose land is flooded by reason of their failure to perform such duty.³

¹ *Alexander v. Milwaukee*, 16 Wis. 247 (1862).

² *Wheeler v. Worcester*, 10 Allen (Mass.), 591, 602 (1865).

³ *Blizzard v. Danville*, 175 Pa. St. 479 (1896), (34 Atl. Rep. 846).

A municipality has no right to stop up the channel of a watercourse by an embankment made in the course of grading a street under its general power to grade and improve its highways, in consequence of which the waters are caused to set back upon the land of a private person, without being answerable at common law.¹ But to render it liable in such a case, the injury must, of course, be directly attributable to its own act or neglect; it is not responsible for the consequences of the acts of a mere wrong-doer.²

If the corporation has acquired a valid right to obstruct the waters of a natural stream, it must exercise due care and skill in constructing,³ and as well in maintaining⁴ the dam, so that no unnecessary damage shall be done to the property of riparian proprietors. This means that it must make provision, with reference to the strength and solidity of the structure, not alone for the ordinary and usual flow of the water, but also for such extraordinary floods as may reasonably be expected occasionally to occur.⁵

And so a corporation which is itself a riparian proprietor is not bound to erect an embankment or levee in

¹ *Conniff v. San Francisco*, 67 Cal. 45 (1885), (7 Pac. Rep. 41); *Rose v. St. Charles*, 49 Mo. 509 (1872).

² *Hoagland v. Sacramento*, 52 Cal. 142 (1877); *Peck v. Ellsworth*, 36 Me. 393 (1853); *Haynes v. Burlington*, 38 Vt. 350, 363 (1865).

³ *Mayor, etc. of New York v. Bailey*, 2 Den. (N. Y.) 433 (1845). In this case, which was an action for damages caused by the giving away of a dam because of its faulty construction, the court says, at page 440: "The degree of care and foresight which it is necessary to use, in cases of this description, must always be in proportion to the nature and magnitude of the injury that will be likely to result from the occurrence which is to be anticipated and guarded against."

⁴ *Baltimore v. Merryman*, 86 Md. 584 (1898), (39 Atl. Rep. 98).

⁵ *Mayor, etc. of New York v. Bailey*, 2 Den. (N. Y.) 433 (1845).

order to protect the premises of a private individual from injury by the overflow of the waters of the stream, in the absence of a statute creating such a duty; and hence, if it has voluntarily erected improvements of that kind, it is not responsible for any damage that may be occasioned by its subsequently causing or permitting the destruction of them.¹

§ 170. The Obstruction of a Watercourse by Bridges or Culverts. — Under the general power, commonly conferred upon municipal corporations by charter or general laws, to lay out, grade, and improve streets and highways within the limits of their territory, they undoubtedly have the right, where they deem it necessary, to construct public ways over natural streams. But it by no means follows from this that they have also the right to close up the channel and so to obstruct the natural flow of the water; on the contrary they are bound in such cases to construct proper and sufficient culverts or passageways for the free flow of the water.

In determining the expediency of laying out a highway over a watercourse and in establishing the grade of such highway, a municipal corporation acts in its legislative or quasi judicial capacity, and hence is not ordinarily responsible for any injuries that may ensue therefrom to private individuals. But at this point judicial duty ends. The fixing of the size and capacity of the culvert or water-ways by which the waters of the stream shall pass under the embankment or bridge, as well as the actual work of building the necessary structure, is purely ministerial in character, and must consequently be done with proper care and skill in order that liability may be escaped. The corporation has no discretion as to such matters. The rule seems to have become well settled, therefore, that if, by reason

¹ *Collins v. Macon*, 69 Ga. 542 (1882).

of the insufficient capacity of a culvert,¹ or of the passageways for water under a bridge,² the free flow of a natural stream is so interfered with and obstructed as to cause the waters to flow back upon the land of a private person, the municipality will be liable at common law for the resulting injury, unless it appears that such insufficient capacity to carry off the water was due to other causes than a failure to exercise due care and skill in determining their size.³

The rule of liability is the same where the backwater is caused by the negligence of the corporation in the work of constructing or in properly maintaining culverts or other passageways for the waters of a natural stream.⁴

¹ *Arkansas.* *Helena v. Thompson*, 29 Ark. 569 (1874).

Indiana. *Ross v. Madison*, 1 Ind. 281 (1848).

Kansas. *Kansas City v. Slangstrom*, 53 Kan. 431 (1894), (36 Pac. Rep. 706).

Missouri. *Young v. Kansas City*, 27 Mo. App. 101 (1887).

New Hampshire. *Gilman v. Laconia*, 55 N. H. 130 (1875).

Vermont. *Haynes v. Burlington*, 38 Vt. 350, 360 (1865).

Wisconsin. *Spelman v. Portage*, 41 Wis. 144 (1876).

² *Mootry v. Danbury*, 45 Conn. 550 (1878); *Stone v. Augusta*, 46 Me. 127 (1858); *Perry v. Worcester*, 6 Gray (Mass.), 544 (1856); *Sprague v. Worcester*, 13 Gray (Mass.) 193 (1859); *Wheeler v. Worcester*, 10 Allen (Mass.), 591, 604 (1865).

³ *M'Clure v. Red Wing*, 28 Minn. 186, 195 (1881), (9 N. W. Rep. 767).

The exercise of due care and skill in fixing the dimensions of a culvert or the passageways under a bridge requires that such capacity shall be given to them that the free flow of the water of the stream in its high and low annual stages, open or frozen, or carrying off floating ice, shall not be obstructed. *Perry v. Worcester*, 6 Gray (Mass.), 544 (1856); *Sprague v. Worcester*, 13 Gray (Mass.), 193 (1859).

⁴ *Haynes v. Burlington*, 38 Vt. 350 (1867). In this case it was held, at page 362, that it was as much the duty of a corporation to keep and maintain a sufficient passageway for a natural stream as to provide for it when constructing the way. Hence if a culvert becomes obstructed, and the municipal authorities neglect, after reasonable

§ 171. **The Diversion of a Watercourse by changing its Channel.**—If, in making a public improvement under its general power, it becomes necessary, in the judgment of a municipal corporation, to divert the waters of a natural stream so as to cause them to flow where they did not, and would not, flow by nature, such corporation is bound to provide an adequate and proper channel to carry off the water without injury to private individuals. This obligation is not discretionary, but ministerial. Hence if, by reason of the omission of the corporate authorities to exercise reasonable care, skill and judgment, the artificial channel is not given sufficient width and depth to carry off the waters diverted into it, in high as well as in low water seasons, in consequence of which it sets back upon the premises of a private person, the municipality will be answerable at common law for the injury that ensues.¹ notice, to remove the difficulty, the municipality will be liable for the resulting damage.

When a municipality and a third person, by their concurrent wrongdoing, cause the water of a natural stream to set back, they are jointly and severally liable, and hence the person injured thereby may at his option bring suit against one or both of them. *Kansas City v. Slangstrom*, 53 Kan. 481 (1894), (36 Pac. Rep. 706); *Wheeler v. Worcester*, 10 Allen (Mass.), 591, 600 (1865).

In *Sprague v. Worcester*, 13 Gray (Mass.), 193, 197 (1859), Chief Justice Shaw says: "All the defendants were bound to do was to build a bridge with a waterway reasonably sufficient to carry off the water, in its ordinary and usual condition, at all seasons of the year." And it was held in the same case that the defendant city could not be required to build a bridge that would subject it to unreasonable expense.

¹ *Willson v. Boise City*, 55 Pac. Rep. 887 (Idaho, 1889); *M'Clure v. Red Wing*, 28 Minn. 186 (1881), (9 N. W. Rep. 767); *Barns v. Hannibal*, 71 Mo. 499 (1880); *Barden v. Portage*, 79 Wis. 126 (1891), (48 N. W. Rep. 210).

In *M'Clure v. Red Wing*, 28 Minn. 186, 195 (1881), (9 N. W. Rep. 767), the court says that municipal corporations were not required to anticipate extraordinary and unusual storms which would not be expected to occur in view of the past history of the country. And in

§ 172. The Pollution of a Watercourse by discharging Sewage therein.—The general power, commonly conferred upon municipal corporations, to construct and maintain drains and sewers, although necessarily including the right to find a place to discharge the contents of them, by no means carries with it the right to so pollute the waters of a natural stream as to create a nuisance. While the lower riparian proprietors cannot insist that the waters of such a stream shall come to them in a naturally pure state; while they must submit without compensation to the natural wash and drainage coming from towns and cities along its banks, they can object to such an increased and unreasonable corruption of the water as shall interfere with their natural rights. Hence if a municipality, in the absence of a legal right to so do,¹ discharges its sewage into a watercourse polluting its waters to such an extent as to create a private nuisance, any lower riparian proprietor injured thereby may recover damages in an action at common law.² And the right of such lower proprietor

Diamond Match Co. v. New Haven, 55 Conn. 510 (1888), (13 Atl. Rep. 409), the defendant city was held not liable for the set-back of the waters of a stream which it had narrowed and straightened, where same was caused by an extraordinary flood.

A lower riparian proprietor can maintain an action at common law to recover damages for the diversion of the waters of a private stream, from a corporation which is authorized to supply its inhabitants with water, but which has not acquired the right to the waters of such stream by the exercise of its right of eminent domain. Irving's Executors v. Borough of Media, 194 Pa. St. 648 (1900), (45 Atl. Rep. 482).

¹ The right to corrupt the waters of a natural stream may, it seems, be acquired by a municipal corporation by grant or prescription, Dwight v. Hayes, 150 Ill. 273, 281 (1894), (37 N. E. Rep. 218); or by valid legislative authority, Butler v. Worcester, 112 Mass. 541 (1873).

² Bloomington v. Costello, 65 Ill. App. 407 (1895); Columbus v. Hydraulic Woolen Mills Co., 33 Ind. 435 (1870); Merrifield v. Worcester, 110 Mass. 216 (1872); Joplin Consolidated, etc. Co. v.

to maintain a civil action is the same if the pollution of the water is carried to such an extent as to create a public nuisance, provided he has suffered some particular loss or damage beyond that received by him in common with all others affected thereby.¹

If a municipality takes a natural watercourse as an outlet for its sewage, under a valid authority conferred upon it by the legislature in a statute in which provision is made for the assessment of damages to parties whose estates are injured thereby, it will not be liable in a suit at common law to a lower riparian proprietor for damages which are a necessary result of a proper and careful exercise of the power delegated; the sole right of an owner of a lower estate to recover compensation for such damages is under the provisions of such statute.²

Joplin, 124 Mo. 129 (1894), (27 S. W. Rep. 406); *Smith v. Sedalia*, 152 Mo. 283 (1899), (53 S. W. Rep. 907); *Stoddard v. Saratoga Springs*, 4 N. Y. Supp. 745 (1889); *Butler v. Edgewater*, 6 N. Y. Supp. 174 (1889).

In *Richmond v. Test*, 18 Ind. App. 482 (1897), (48 N. E. Rep. 610), the court held that a municipal corporation which had constructed a system of drainage upon the best modern plans, so as to discharge, as the necessity of the case required, into a natural watercourse which was the natural drainage of the land upon which the defendant city was built, was not liable to a lower proprietor by reason of the pollution of the water by the sewage, there being no lack of due care or skill in doing or maintaining the work. The improvement was lawful in itself, and located where public necessity required.

In a very late New York case it was held that a county was not liable for the pollution of the waters of a natural stream by discharging into it the sewage of a penitentiary and almshouse, on the ground that in the management of such an institution the county authorities were engaged in the performance of a public, governmental duty. *Lefrois v. Monroe County*, 162 N. Y. 563 (1900), (57 N. E. Rep. 185).

¹ *Nolan v. New Britain*, 69 Conn. 668 (1897), (38 Atl. Rep. 703).

² *Washburn & Moen Manuf. Co. v. Worcester*, 116 Mass. 458 (1875). In this case, at page 461, Chief Justice Gray adds: "But if

by an excess of the powers granted, or negligence in the mode of carrying out the system legally adopted, or in omitting to take due precautions to guard against consequences of its operation, a nuisance is created, the city may be liable to indictment in behalf of the public, or to suit by individuals suffering special damage." Citing Haskell *v.* New Bedford, 108 Mass. 208 (1871); Merrifield *v.* Worcester, 110 Mass. 216 (1872); Brayton *v.* Fall River, 113 Mass. 218 (1873).

CHAPTER IX.

THE LIABILITY FOR PRIVATE PROPERTY INJURED OR DESTROYED.

PART I.

By Mobs or Riotous Assemblages of People.

§ 173. **No Liability at Common Law.**—To secure the peaceful enjoyment of property and to protect it from wrongful and violent acts, is a function of government. The duty to exercise that function is a duty which the state owes to all its citizens, and which, to secure its better discharge, the state commonly delegates, with the necessary powers, to municipal corporations. In so far, then, as the latter take action in regard to this duty, whether such action be of a negative character, as an entire omission to take proper steps to protect private property, or consists of the taking of such steps in a negligent and improper manner, they act as the representatives of the state, and as such are entitled to, and are afforded, the same exemption from liability that, from considerations of policy, government itself enjoys. At common law, therefore, municipal corporations are not subjected to any responsibility for the safety of the private property within their territorial limits,¹ even though ample

¹ *Prather v. Lexington*, 13 B. Mon. (Ky.) 559 (1852); *Ward v. Louisville*, 16 B. Mon. (Ky.) 184 (1855); *Fauvia v. New Orleans*, 20 La. An. 410 (1868), *semble*; *Baltimore v. Poultney*, 25 Md. 107 (1866); *Western College of Medicine v. Cleveland*, 12 Oh. St. 375 (1861);

power to regulate the police and to prevent disorderly assemblages is expressly conferred upon them.¹ And it makes no difference in this rule of immunity that the corporate authorities had notice of the intention of the mob to destroy the property in question in time to have saved it by a proper use of the means at their command.²

§ 174. The Statutory Liability — Its Theory and Nature.

— In a number of states statutes have been enacted imposing upon municipal corporations in express terms the obligation to provide compensation for property injured or destroyed by mobs or riotous assemblages of people, and each statutes have invariably been held to be constitutional.³

The underlying principle of all such legislation, which is of ancient origin,⁴ is that every political subdivision of Allegheny County *v.* Gibson, 90 Pa. St. 397, 404 (1879); Hart *v.* Bridgeport, 13 Blatch. (U. S.) 289 (1876).

¹ Western College of Medicine *v.* Cleveland, 12 Oh. St. 375, 379 (1861).

² Ward *v.* Louisville, 16 B. Mon. (Ky.) 184 (1855).

³ Luke *v.* Brooklyn, 43 Barb. (N. Y.) 54, 57 (1864); Darlington *v.* Mayor, etc. of New York, 31 N. Y. 164 (1865); Orr *v.* Brooklyn, 36 N. Y. 661, 667 (1867); *In re Pennsylvania Hall*, 5 Pa. St. 204 (1847); Allegheny County *v.* Gibson, 90 Pa. St. 397, 405 (1879); and see Hagerstown *v.* Sehner, 37 Md. 180 (1872).

⁴ The principle of legislation of this character is derived from England. "As early as 1285, the Parliament of England, by Statute of Winton, or Winchester, 1 Stat. 13 Edw. 1, p. 2, ch. 3 (see 1 Hawk. P. C., ch. 68, sect. 11), provided a remedy against the hundred, county, etc., in which a robbery should take place, for the damages caused thereby, to be recovered by the party robbed in an action against any one or more of the inhabitants. This statute was re-enacted by 28 Edw. 3, ch. 2. Subsequently the Statute 27 Eliz., ch. 18, sect. 2, provided for the assessment of the damages against all the inhabitants of the hundred after a recovery against one or more. Next we have the famous Riot Act of 1 George 1, ch. 5, sects. 1-7, which was passed by reason of the tumult attendant upon the accession of that king to the throne, and which made it a felony, without benefit of clergy, for any persons unlawfully to assemble and demolish any church or dwell-

the state, being clothed with sovereign power so far as is necessary for the preservation of private property, should be made responsible for the proper exercise of that power; and that this end could be best secured by giving each individual member of the community a direct and pecuniary interest therein, which should so stimulate the vigilance of each as to lead to more effective action toward the suppression and prevention of riotous assemblages.¹

As is apparent from a consideration of the theory upon which such laws are based, they are both remedial and punitive in character. They are remedial in that they provide for compensation to the person whose property has been injured or destroyed; they are punitive in that they throw the burden of that compensation upon the corporation within whose territory the injury or destruction took place.²

The right to reimbursement for property injured or
ing-house. The sixth section of the same act provided that in case such church or dwelling-house should be destroyed, the inhabitants of the hundred in which it was situated should be liable for its value. This was followed by the Act of George 2, ch. 10, sect. 1, and the laws upon this subject were consolidated, in 1827, by 7 and 8 George 4, ch. 31." Mr. Justice Paxson, in *Allegheny County v. Gibson*, 90 Pa. St. 397 (1879), at page 405.

¹ See *Williams v. New Orleans*, 23 La. An. 507 (1871); *Allegheny County v. Gibson*, 90 Pa. St. 397, 418 (1879). In the Louisiana case the court says, at page 508: "When the importance of social order and the security of person and property resulting from it are impressed upon the public mind by the strong influence of pecuniary responsibility, a sharper vigilance is excited and a more efficient action aroused in regard to the prevention and suppression of riotous assemblages, by which, in large cities especially, property is so often damaged and destroyed."

² *Underhill v. Manchester*, 45 N. H. 214, 221 (1864); *Allegheny County v. Gibson*, 90 Pa. St. 397, 418 (1879). "The end to be accomplished is not merely compensation for loss," say the court in the New Hampshire case, "but prevention of loss, with compulsory compensation as the incentive means." Page 221.

destroyed by a mob is purely a creation of the legislature, and is not founded upon contract.¹ Hence an injured person must bring his case within the terms of the statute of which he wishes to avail himself,² and must comply with any conditions which the legislature has seen fit to impose.³

§ 175. The Property within the Protection of such Statutes. — The term "property" as used in statutes which impose a liability upon municipal corporations for property injured or destroyed by a mob or riotous assemblage, commonly includes any property, either real or personal, which happens to be, at the time when the damage is done, within the territorial limits of the corporation sought to be charged

¹ *Louisiana v. New Orleans*, 109 U. S. 285 (1883), (3 S. Ct. Rep. 211). In this case, Mr. Justice Bradley, concurring, says: "I concur in the judgment in this case, on the special ground that remedies against municipal bodies for damages caused by mobs, or other violators of law unconnected with the municipal government, are purely matters of legislative policy, depending on positive law, which may at any time be repealed or modified, either before or after the damage has occurred, and the repeal of which causes the remedy to cease. In giving or withholding remedies of this kind, it is simply a question whether the public shall, or shall not, indemnify those who sustain losses from the unlawful acts or combinations of individuals; and whether it shall, or shall not, do so, is a matter of legislative discretion; just as it is whether the public shall, or shall not, indemnify those who suffer losses at the hands of a public enemy, or from intestine commotions or rebellion."

In *Clear Lake, etc. Co. v. Lake County*, 45 Cal. 90 (1872), it was held that such a statute created a new right and provided a new remedy therefor, which was complete in itself, and that therefore it was not necessary that a claim arising under it should be presented to the Board of Supervisors for allowance before bringing an action upon it, as was required by the terms of another statute in the case of claims against counties.

² *Fauvia v. New Orleans*, 20 La. An. 410 (1868).

³ *Hill v. Rensselaer County*, 119 N. Y. 344 (1890), (23 N. E. Rep. 921). In this case it was held that a provision of the statute limiting the time within which the action should be commenced must be strictly complied with in order that the suit might be maintained.

with liability. Thus goods in the course of transportation when the damage was done come within such statutes, as well as any other property.¹

The question whether the owner of the property injured or destroyed by a mob was or was not a resident of the defendant corporation, does not in the least affect its liability. The property of non-residents comes within the terms of such statutes to the same extent as that of residents.² Nor is it material whether the property is actually destroyed on the premises where it was situated when the riot took place, or is carried away by the rioters. Property carried off by them is held to be destroyed, so far as its owner is concerned, as effectually as though rendered valueless by the acts of the mob.³

Although the property injured or destroyed may constitute a nuisance either in itself or by reason of the use to which it was put by its owner, that fact does not afford any defence to an action under such a statute. Even such property is entitled to the protection of the law, and a mob has no right to destroy it.⁴

§ 176. The Assemblage by which the Property is injured or destroyed. — The statutory liability imposed upon municipal corporations is for property injured or destroyed by a mob. Hence it is essential to a recovery in any par-

¹ *Allegheny County v. Gibson*, 90 Pa. St. 397, 421 (1879).

² *Allegheny County v. Gibson*, 90 Pa. St. 397, 420 (1879).

³ *Sarles v. Mayor, etc. of New York*, 47 Barb. (N. Y.) 447 (1866); *Solomon v. Kingston*, 24 Hun (N. Y.), 562 (1881).

⁴ *Brightman v. Bristol*, 65 Me. 426 (1876); *Ely v. Niagara County*, 36 N. Y. 297 (1867); *Duffy v. Baltimore*, *Taney C. C. (U. S.)* 200 (1852).

Where the plaintiff's property was not directly fired by the mob, but fire was communicated to it from a neighboring building which the mob had set on fire, it was held that property so destroyed came within the statute. *Lavery v. Philadelphia County*, 2 Pa. St. 231 (1845).

ticular case to show that the injury or destruction was the work of a number of people assembled for unlawful purposes; if it appears that the assemblage by which the damage was done was not in fact of such a character, then no liability arises against the corporation within whose territory the loss happened.¹

But if the assemblage by which the damage is done is a mob, then it makes no difference that all the rioters were not citizens of the defendant corporation;² nor that the original purpose for which the crowd come together was lawful, if it subsequently engaged in unlawful conduct.³

§ 177. The Preventability of the Injury or Destruction of the Property.—The liability fastened by statute upon municipal corporations for the injury or destruction of private property by mobs or unlawful assemblages is in one aspect, as already pointed out, of a penal nature. It is commonly imposed irrespective of any negligence on the part of the corporations, and hence, unless expressly so provided in the statute,⁴ nothing hinges upon the question whether or not the loss or damage could or ought to

¹ *Fauvia v. New Orleans*, 20 La. An. 410 (1868); *Street v. New Orleans*, 32 La. An. 577 (1880); *Duryea v. Mayor, etc. of New York*, 10 Daly (N. Y.), 300 (1882); *Duffy v. Baltimore*, Taney C. C. (U. S.) 200 (1852). And see *Baltimore v. Poultnay*, 25 Md. 107 (1866).

Where it appeared that the damage was done by a gathering of boys who had no intention to resist the public authorities, and who dispersed on sight of a single police officer, it was held that the plaintiff's property was not destroyed by a mob within the meaning of the statute. *Duryea v. Mayor, etc. of New York*, 10 Daly (N. Y.), 300 (1882).

² *Atchison v. Twine*, 9 Kan. 350 (1872); *Chadbourne v. Newcastle*, 48 N. H. 196 (1868); *Palmer v. Concord*, 48 N. H. 211, 218 (1868).

³ *Solomon v. Kingston*, 24 Hun (N. Y.), 562, 563 (1881).

⁴ The Maryland statute, it seems, makes the liability turn upon the neglect of the corporate authorities to exercise the powers given them for the suppression of mobs. *Hagerstown v. Sehner*, 37 Md. 180, 195 (1872).

have been prevented. However harsh it may seem, it is the rule, in the absence of an express provision changing it, that no defence to an action under such a statute is afforded by the fact that the defendant corporation could not prevent the injury to, or the destruction of, the plaintiff's property.¹

§ 178. Notice of the Impending Injury or Destruction of Property.—A provision is usually made a part of those statutes which create a liability for the loss or damage occasioned by the acts of unlawful assemblages, that no person shall be entitled to indemnity who, having knowledge of the intention of a mob to injure or destroy his property in time to notify specified officials of the corporation before the mob acts, omits to give such notice. The primary purpose of a provision of this character is not to limit the liability to cases where notice has been given, but, in furtherance of that general policy upon which such legislation is framed, to furnish to the proper corporate officers information of the impending danger in such time that they may take whatever steps are necessary in order to disperse the mob and protect the property. Accordingly it has been held that if a person knows of the danger to his property and has an opportunity to notify the proper corporate authorities, his omission to so do is a bar to a recovery under such a statute.² But if he has no knowledge of the

¹ *Atchison v. Twine*, 9 Kan. 350 (1872); *Chadbourne v. Newcastle*, 48 N. H. 196 (1868); *Palmer v. Concord*, 48 N. H. 211, 217 (1868); *Allegheny County v. Gibson*, 90 Pa. St. 397, 417 (1879).

Where it appeared that the authorities of the defendant city did not have the management of the police force, but that the same was vested in a Board of Metropolitan Police, it was held that this fact did not release the city from liability under the statute for property destroyed by a mob. *Williams v. New Orleans*, 23 La. An. 507 (1871). See also *Hagerstown v. Dechert*, 32 Md. 369, 385 (1869).

² *Wing Chung v. Los Angeles*, 47 Cal. 531 (1874).

The fact that threats and complaints were communicated to the

intention of the mob and so could not notify the proper corporate officers,¹ or if, having knowledge of the impending danger, he has no opportunity to notify such officers before the damage is done,² the failure to give any notice in accordance with such a provision of the statute will not prevent him from maintaining an action to recover compensation for his loss. And so, if the proper corporate authorities have been informed from other sources of a threatened outbreak of mob violence, an omission of a person to give them notice will afford the corporation no defence.³

§ 179. The Effect of the Plaintiff's Conduct. — Those statutes that require municipal corporations to indemnify private persons for property injured or destroyed by mob or riotous gathering, commonly provide that there shall be no liability if such injury or destruction was due to the plaintiff's own conduct. In some states, the provision upon this point is that he shall not recover if the action of the mob in injuring or destroying his property was due to his own "illegal or improper conduct;"⁴ in other states,

plaintiff, and the fact that intimations of danger were given to him, are competent evidence on the issue whether he should have given notice. *Palmer v. Concord*, 48 N. H. 211, 218 (1868).

¹ *Moody v. Niagara County*, 46 Barb. (N. Y.), 659 (1866); *Ely v. Niagara County*, 36 N. Y. 297, 298 (1867); *Donoghue v. Philadelphia County*, 2 Pa. St. 230 (1845).

It may be noted that an apprehension of an intended attack and destruction of property is not knowledge thereof, and that the statute requires a person to act, in the matter of notice, only upon knowledge. *St. Michael's Church v. Philadelphia County*, Bright. (Pa.) 121 (1847).

² *Schiellein v. Kings County*, 43 Barb. (N. Y.) 490 (1865); *Solomon v. Kingston*, 24 Hun (N. Y.), 562, 564 (1881); *Allegheny County v. Gibson*, 90 Pa. St. 397, 414 (1879).

³ *Newberry v. Mayor, etc. of New York*, 1 Sweeny (N. Y.), 369 (1869); *Allegheny County v. Gibson*, 90 Pa. St. 397, 414 (1879).

⁴ Under such a provision, it seems that the separate meaning of the

that he shall not recover if his loss or damage was "due in any manner" to his own "carelessness or negligence."¹ Whatever the wording of the provision may be, in order to constitute a defence under it, the conduct of the plaintiff must, of course, be such as clearly to come within its terms.

§ 180. The Damages recoverable. — In an action under a statute which imposes a liability upon municipal corporations for private property injured or destroyed by a mob, the plaintiff is entitled to compensation to the full extent of his injury, unless it is otherwise expressly provided in the statute.² He is not entitled to anything beyond this, and hence cannot recover exemplary or vindictive damages. The measure of his damages, nothing to the contrary appearing in the statute itself, if his property has been destroyed by a mob, is its fair value on the day of its two words "illegal" and "improper" is to be given effect. Underhill *v.* Manchester, 45 N. H. 214 (1864). "Improper conduct" has been held to be such conduct as a man of ordinary and reasonable care and prudence would not have been guilty of under the circumstances. Chadbourne *v.* Newcastle, 48 N. H. 196 (1868); Palmer *v.* Concord, 48 N. H. 211 (1868); and see Allegheny County *v.* Gibson, 90 Pa. St. 397, 415 (1879). In order to defeat an action on this ground, it must appear that the "illegal or improper conduct" of the plaintiff was a proximate cause of the injury or destruction of his property. Allegheny County *v.* Gibson, 90 Pa. St. 397, 415 (1879).

¹ Using property as a bawdy house is not "carelessness or negligence" within the meaning of such a provision. Blodgett *v.* Syracuse, 36 Barb. (N. Y.) 526 (1862); Ely *v.* Niagara County, 36 N. Y. 297, 300 (1867). Nor is using premises for purposes which constitute a nuisance, as the manufacture of porgy oil, contributory negligence. Brightman *v.* Bristol, 65 Me. 426 (1876). But where a plaintiff had assembled an armed force in his store and had fired upon the police when they attempted to restore order, he was held to be guilty of careless and negligent conduct which contributed to the riot and destruction of property which followed, within the meaning of such a provision of the statute. Wing Chung *v.* Los Angeles, 47 Cal. 531 (1874).

² In Maine the statute provides that a plaintiff may recover three-

destruction.¹ And it has been held that interest by way of damages is to be added to such value.²

fourths of the amount of such damage as he may sustain by the action of the mob. Brightman *v.* Bristol, 65 Me. 426, 438 (1876).

¹ Hermits of St. Augustine *v.* Philadelphia County, Bright. (Pa.) 116 (1847); St. Michael's Church *v.* Philadelphia County, Bright. (Pa.) 121 (1847).

² Greer *v.* Mayor, etc. of New York, 3 Robt. (N. Y.) 406 (1865).

In Fortunich *v.* New Orleans, 14 La. An. 115 (1859), it was held that the defendant city might show, not as a complete bar to the action but in mitigation of damages, that the plaintiffs had exposed their property in the public market in violation of an ordinance of the city which required the markets to be closed at the hour when the injury was done.

The Liability of Municipal Corporations for Personal Injuries or Death caused by the Acts of a Mob. — The preservation of the public peace is another of those duties which, primarily devolving upon the state, is usually delegated by it to municipal corporations. "When by the action of the state, a municipal corporation is charged with the preservation of the peace, and empowered to appoint police boards and other agencies to that end, the corporation *pro tanto* is charged with governmental functions in the public interest and for public purposes, and is entitled to the same immunity as the sovereign granting the power for neglect in preserving the public peace, unless such liability is expressly declared by the sovereign." Hence no liability rests upon them at common law for the death or injury of a person occasioned by an unlawful assemblage. Campbell *v.* Montgomery, 53 Ala. 527 (1875); Jolly *v.* Hawesville, 89 Ky. 279 (1889), (12 S. W. Rep. 313); Robinson *v.* Greenville, 42 Oh. St. 625 (1885); New Orleans *v.* Abbagnato, 62 Fed. Rep. 240 (1894). And a statute imposing upon corporations a liability for the destruction of property by mobs will not make it liable for personal injuries or death caused by such assemblages. Gianfortone *v.* New Orleans, 61 Fed. Rep. 64 (1894).

Municipal corporations may, however, be made liable by statute for death or personal injury caused in such manner, Atchison *v.* Twine, 9 Kan. 350 (1872): but in order to enforce such liability, it must be shown that the assemblage by which the injury was done was a mob, Aron *v.* Wausau, 74 N. W. Rep. 354 (Wis., 1898). See also Dale County *v.* Gunter, 46 Ala. 118 (1871); Luke *v.* Calhoun County, 52 Ala. 115 (1875), where a statutory liability for the death of a person, caused by parties in ambush, was enforced.

PART II.

By Officers or Agents of the Corporation, to prevent the Spread of Fire.

§ 181. No Corporate Liability for such Destruction at Common Law. — There seems to be quite general agreement among the authorities that when, in a case of necessity, private property is destroyed by the direction of the officers or agents of a municipal corporation, acting under the authority of some general law or city ordinance,¹ in order to arrest the progress of a conflagration, no liability at common law attaches to the corporate body.² But while

¹ It appears to make no difference in the rule, especially if the police-power theory be adopted as the basis of it, whether such ordinance be valid and one that the corporation had power to enact, or not; for if valid, there is no liability as pointed out in the text, and if not valid, then the destruction of the property was unauthorized by the corporation, and it consequently cannot be held responsible. *Field v. Des Moines*, 39 Ia. 575 (1874); *McDonald v. Red Wing*, 13 Minn. 38 (1868); *White v. Charleston*, 2 Hill (S. C.), 571 (1835).

² *California.* *Dunbar v. San Francisco*, 1 Cal. 355 (1850).

Iowa. *Field v. Des Moines*, 39 Ia. 575 (1874).

Massachusetts. *Taylor v. Plymouth*, 8 Met. 462, 465 (1844).

Minnesota. *McDonald v. Red Wing*, 13 Minn. 38 (1868).

New York. *Russell v. Mayor, etc. of New York*, 2 Den. 461 (1845).

South Carolina. *White v. Charleston*, 2 Hill, 571 (1835).

Texas. *Keller v. Corpus Christi*, 50 Tex. 614 (1879).

So far as is known, the only case laying down a contrary rule is that of *Bishop v. Macon*, 7 Ga. 200 (1849), where it was held without discussion and without the citation of any common law authority, that when private property, which might have been saved, was destroyed to prevent the spread of a fire, the owner could recover for the loss. Speaking of this decision in *Dunbar v. San Francisco*, 1 Cal. 355, 358 (1850), Mr. Justice Bennett says: "Without some provision in the charter, or some statutory enactment, imposing the liability upon the city, I do not see how that decision can be sustained." But *quære* whether it may not be sound law according to the law of necessity doctrine, since it seems to have been a fact in the case that

it is thus agreed that the destruction of private property under such circumstances is not an exercise of the right of eminent domain,¹ and raises no common law liability, there is by no means complete harmony of opinion as to the real grounds of the rule. In some jurisdictions it is considered that such destruction of private property is an exercise of the police power expressly vested in the corporation by the state, to which no liability attaches unless expressly so declared by legislative enactment.² In other jurisdictions the decision in cases of this class is rested upon the law of overruling necessity. Under this latter doctrine, statutory or charter provisions, delegating power to a corporation to destroy private property in order to prevent the spread of fire, are regarded not as conferring a new power under which the corporation may justify its action, but simply as regulating the exercise of a right that already existed.³

Whatever differences of opinion may exist as to the true principles upon which it stands, the rule itself, as already indicated, is clear and well supported by authority.

§ 182. A Liability in such Cases may be created by Statute. — It is within the power of the state, if it sees fit, to provide for the reimbursement of private persons

the destruction of the plaintiff's property was not necessary, which fact, in an action against a natural person, would give rise to a liability. See *Taylor v. Plymouth*, 8 Met. (Mass.) 462, 465 (1844).

¹ In the following cases it was expressly decided that such a destruction of private property was not an exercise of the right of eminent domain. *Field v. Des Moines*, 39 Ia. 575, 585 (1874); *McDonald v. Red Wing*, 13 Minn. 38, 41 (1868); *Russell v. Mayor, etc. of New York*, 2 Den. (N. Y.), 461 (1845).

² *Field v. Des Moines*, 39 Ia. 575 (1874); *Keller v. Corpus Christi*, 50 Tex. 614 (1879). The cases of *McDonald v. Red Wing*, 13 Minn. 38 (1868), and *White v. Charleston*, 2 Hill (S. C.), 571 (1835), appear also to stand upon this ground.

³ *Taylor v. Plymonth*, 8 Met. (Mass.) 462, 465 (1844); *Russell v. Mayor, etc. of New York*, 2 Den. (N. Y.) 461 (1845).

who have sustained losses through the destruction of their property by the direction of the officers or agents of a municipal corporation in order to check a conflagration,¹ and statutes for that purpose have been enacted in several states. Such a remedy is, of course, purely statutory, and hence an injured person must, in order to recover under it, bring his case fairly within its terms.²

¹ Bowditch *v.* Boston, 101 U. S. 16 (1879).

² Taylor *v.* Plymouth, 8 Met. (Mass.) 462 (1844); Ruggles *v.* Nantucket, 11 Cush. (Mass.) 433 (1853); Stone *v.* Mayor, etc. of New York, 25 Wend. (N. Y.) 157 (1840); Russell *v.* Same, 2 Den. (N. Y.) 461 (1845); Bowditch *v.* Boston, 101 U. S. 16 (1879).

Under the New York statute, which provided for the assessment of those "damages which the owner of such building, and all persons having any estate or interest therein have respectively sustained by the pulling down or destruction thereof," it has been held that a lessee of a building so destroyed was entitled to damages for the merchandise and personal property belonging to him, which was in, and destroyed with, the building, Mayor, etc. of New York *v.* Lord, 18 Wend. (N. Y.) 126 (1837); but that he cannot recover for merchandise destroyed with the building, which did not belong to him but was in his possession as a factor, or merely for storage, Stone *v.* Mayor, etc. of New York, 25 Wend. (N. Y.) 157 (1840). Nor can the owner of the merchandise so held recover for its loss, if he has no interest in the building. Russell *v.* Mayor, etc. of New York, 2 Den. (N. Y.) 461 (1845).

In Massachusetts, where the statute provides that when the pulling down of a building, by order of three firewards, or of certain other officers in the absence of firewards, shall be the means of stopping a fire, the owner of such building shall be entitled to recover reasonable compensation therefor from the city or town, the courts have held that, in order to recover, a plaintiff must show that he was the legal owner of the building destroyed, Ruggles *v.* Nantucket, 11 Cush. (Mass.) 433 436 (1853); that the destruction of the building was ordered by three firewards jointly: proof of the destruction by the direction of one fireward not being sufficient, Coffin *v.* Nantucket, 5 Cush. (Mass.) 269 (1850); that the three firewards ordered the destruction of his building, and not merely that they agreed generally that some building should be demolished, Ruggles *v.* Nantucket, 11 Cush. (Mass.) 433, 436 (1853). And it has also been held that the owner of a building which had been pulled down by the order of three firewards could not

PART III.

*By the Officers or Agents of the Corporation, to abate
a Public Nuisance.*

§ 183. Corporations generally not Liable for Damages due to the Abatement of Public Nuisances. — The power to abate public nuisances which is commonly vested in municipal corporations by the state carries with it the right to take whatever steps may be necessary to its proper exercise. If, therefore, in the course of such exercise of this power, the property of a private person is injured or destroyed, the corporation is not responsible at common law for such loss, provided no greater damage has been done than was necessary.¹ Such loss is not a taking of private property for public use without compensation or without due process of law within the meaning of the constitutional prohibition,² but is simply a result of the legitimate exercise recover under the statute for his loss where it appeared that such destruction was carried out after the building was so far burnt that it was impossible to save it. *Taylor v. Plymouth*, 8 Met. (Mass.) 462 (1844).

In *Dawson v. Kuttner*, 48 Ga. 133 (1873), it was decided by the court that under a statute giving a right to compensation where "private property" was destroyed for the public good, "such as the destruction of houses to prevent the spread of a conflagration," the plaintiff might recover for the loss of personal property destroyed with the building that had been demolished for such purpose.

¹ *Ferguson v. Selma*, 43 Ala. 398 (1869); *Americus v. Mitchell*, 79 Ga. 807 (1887), (5 S. E. Rep. 201); *King v. Davenport*, 98 Ill. 305 (1881); *Indianapolis v. Miller*, 27 Ind. 394 (1866); *Cole v. Kegler*, 64 Ia. 59 (1884), (19 N. W. Rep. 843); *Haskell v. New Bedford*, 108 Mass. 208, 211 (1871); *St. Louis v. Stern*, 3 Mo. App. 48 (1876).

² *Green v. Savannah*, 6 Ga. 1 (1849); *Manhattan, etc. Co. v. Van Keuren*, 23 N. J. Eq. 251 (1872). In this last case Vice-Chancellor Dodd says, at page 255: "In abating it [a public nuisance] property may be destroyed and the owner deprived of it without trial, without notice, and without compensation. Such destruction for the public

of that portion of the police power of the state which is necessarily vested in municipal corporations for the conservation of the health, safety, and comfort of their citizens.¹

But in order to avail themselves of this immunity from liability municipal corporations must show that the thing abated was in fact a nuisance, and that no unnecessary damage was done in the abatement of it. If the thing abated was not in fact a nuisance,² or if unnecessary damage was done to private property in the abatement of it,³ then the municipality becomes liable at common law for the damage done.

safety or health, is not a taking of private property for public use, without compensation or due process of law, in the sense of the Constitution. It is simply the prevention of its noxious and unlawful use, and depends upon the principles that every man must so use his property as not to injure his neighbor, and that the safety of the public is the paramount law. These principles are legal maxims or axioms essential to the existence of regulated society. Written constitutions presuppose them, are subordinate to them, and cannot set them aside. They underlie and justify what is termed the police power of the state."

¹ *Baker v. Boston*, 12 Pick. (Mass.) 184, 194 (1831).

² *Americus v. Mitchell*, 79 Ga. 807 (1887), (5 S. E. Rep. 201); *Cole v. Kegler*, 64 Ia. 59 (1884), (19 N. W. Rep. 843).

A corporation cannot by its own declaration make a thing a nuisance when it is not so in fact, and then subject it to removal as such. *Yates v. Milwaukee*, 10 Wall. (U. S.) 497 (1870).

³ *Bush v. Dubuque*, 69 Ia. 233 (1886), (28 N. W. Rep. 542). And see cases cited on page 303, note 1.

In *Clark v. Syracuse*, 13 Barb. (N. Y.) 32 (1852), the court held that the defendant city had no right under its general powers regarding nuisances, in order to abate the nuisance arising from stagnant water, to remove a dam erected by the plaintiff for the purpose of obtaining a water supply at his mill, since the effect would be to destroy a valuable property.

See also *Babcock v. Buffalo*, 1 Sheld. (N. Y.) 317 (1872), affirmed in 56 N. Y. 268 (1874), which is to the same effect.

CHAPTER X.

THE LIABILITY RELATIVE TO NUISANCES.

§ 184. The Liability for creating or maintaining a Public Nuisance. — While municipal corporations have no more right than a private person to create or maintain a common nuisance, nevertheless, so long as the injury suffered by each individual is the same in kind as that suffered by every other individual in the community or section of the community affected by such nuisance, none of them can maintain a private action against the corporate body. The only remedy available in such a case is by indictment. But if, even though the nuisance be a public one, a person can show that he has suffered therefrom some special and peculiar damage, differing in kind from that suffered by him in common with the rest of the community, he is entitled to recover in a civil action compensation therefor from the municipality that created or maintained such nuisance.¹

§ 185. The Liability for creating and maintaining a Private Nuisance. — Speaking generally, municipal corporations stand, in regard to the creation and maintenance of pri-

¹ *Grove v. Fort Wayne*, 45 Ind. 429 (1874); *Franklin Wharf Co. v. Portland*, 67 Me. 46 (1877); *Breed v. Lynn*, 126 Mass. 367 (1879); *Clark v. Peckham*, 10 R. I. 35 (1871); *Harper v. Milwaukee*, 30 Wis. 365 (1872); *Hughes v. Fond du Lac*, 73 Wis. 380 (1889), (41 N. W. Rep. 407).

No right to maintain a public nuisance can be acquired by prescription, for the statute of limitations does not run against the public. *Tainter v. Morristown*, 19 N. J. Eq. 46, 59 (1868).

vate nuisances, on substantially the same footing as private corporations and natural persons. Their rights are no greater; their civil responsibility is generally no less. As a rule, therefore, they are liable in a private action to any individual who suffers damage by reason of a private nuisance created and continued by them.¹

This general rule of liability is subject, it was held in the Maine case of *Seele v. Deering*,² to the exception that if the acts from which the nuisance results were not within the scope of its corporate powers, no liability arises against the corporation. Civil responsibility for private nuisances is thus limited by this decision to such as grow out of acts which they have authority to do.

§ 186. The Liability for not abating a Public Nuisance created or maintained by Private Persons upon their own Premises. — Municipal corporations to whom the state has

¹ *Morgan v. Danbury*, 67 Conn. 484 (1896), (35 Atl. Rep. 499); *Nevins v. Peoria*, 41 Ill. 502 (1866); *Jacksonville v. Doan*, 145 Ill. 23 (1893), (33 N. E. Rep. 878); *Haag v. Vanderburgh County*, 60 Ind. 511 (1878); *Haskell v. New Bedford*, 108 Mass. 208 (1871); *Edmondson v. Moberly*, 98 Mo. 523 (1889), (11 S. W. Rep. 990); *Chapman v. Rochester*, 110 N. Y. 273 (1888), (18 N. E. Rep. 88); *Demby v. Kingston*, 60 Hun (N. Y.), 294 (1891), (14 N. Y. Supp. 601); *Butchers' Ice, etc. Co. v. Philadelphia*, 156 Pa. St. 54 (1893), (27 Atl. Rep. 376).

A city cannot create a nuisance upon the property of a private citizen, and then compel him to abate it. *Hannibal v. Richards*, 82 Mo. 330 (1884).

² 79 Me. 343 (1887), (10 Atl. Rep. 45).

In *Fort Worth v. Crawford*, 64 Tex. 202 (1885), the court held that "in reference to the liability of municipal corporations for creating or failing to remove a nuisance, this distinction is to be observed: If the nuisance grows out of acts done exclusively in the interest of the public, such as the improvement of the sanitary condition of the city, then it would only be liable for a careless or negligent execution of the duty. But if the acts out of which the nuisance originated or is continued were done for the private advantage or emolument of the municipal corporation, then, irrespective of the question of negligence, it would be liable for the injuries resulting therefrom." No authority fairly supporting this distinction has been found.

delegated ample power to abate common nuisances are bound to exercise that power for the removal of such of them as they know, either actually or constructively, to exist. This duty, it seems, is positive. Hence, if any individual suffers a special injury, not common to the whole community, by reason of the failure of a corporation to perform this duty and abate the nuisance, it will be liable for such damage in a private action at common law.¹

§ 187. The Liability for not abating a Private Nuisance created by Third Parties upon Premises under the Control of the Corporation.—The responsibility of municipal corporations for continuing a private nuisance, created by third parties upon premises which subsequently come under the control of such corporations, is identical with that of a private person under like circumstances. No liability arises until after notice of the existence of such nuisance and a request to remove it. But after such notice and request, the person injured by the continuance of such nuisance can recover compensation therefor in a private suit.²

¹ *Parker v. Macon*, 39 Ga. 725 (1869); *Kiley v. Kansas City*, 69 Mo. 102 (1878). In each of these cases the defendant city was held liable for personal injuries suffered by reason of the fall of the partially burned walls of a building which stood upon the premises of a private person, but on, or very near to, the edge of the street. If such walls had stood back from the edge of the street sufficiently far so as not to constitute a public nuisance, then there would be no liability against the city in favor of a person injured by their fall. *Cain v. Syracuse*, 95 N. Y. 83 (1884). See also *Howe v. New Orleans*, 12 La. An. 481 (1857).

² *Morse v. Fair Haven East*, 48 Conn. 220 (1880); *Nichols v. Boston*, 98 Mass. 39 (1876). In this Connecticut case the question whether or not there must be a request to the corporation to remove the nuisance, as well as notice of its existence, was expressly left open. But in the Massachusetts case the request to remove was stated as a part of the rule of liability.

§ 188. The Liability for not abating a Private Nuisance created or maintained by Third Persons upon Private Premises. — The power to abate private nuisances which is generally delegated to municipal corporations is a power conferred upon them for the public good. In its exercise they act, not for their own corporate advantage, but for the public benefit, as the representatives of the state. Hence, upon general principles, they are not responsible at the suit of a private individual for damages occasioned by the failure of their officers to pass the necessary resolutions for the abatement of private nuisances;¹ nor for damages arising from the omission of their officers to enforce the laws and ordinances made and provided for the removal of such nuisances.²

¹ Cain *v.* Syracuse, 95 N. Y. 83 (1884).

² Davis *v.* Montgomery, 51 Ala. 139 (1874); Armstrong *v.* Brunswick, 79 Mo. 319 (1883); McCowell *v.* Bristol, 5 Lea (Tenn.), 685 (1880). In this last case it was decided that no action could be maintained against the defendant city on the ground that a regularly licensed saloon-keeper was permitted to keep his saloon in such a manner as to be a nuisance to the plaintiff, whose residence was upon adjoining property.

CHAPTER XI.

THE LIABILITY RELATIVE TO PUBLIC HEALTH, CHARITIES,
AND SCHOOLS.

§ 189. **The Duties involved in these Matters are governmental, and no Liability attaches to their Performance.** — Duties relating to the preservation of the public health, to the administration of public charities, and to the maintenance of public schools are duties that devolve primarily upon the state as the sovereign power. The performance of them by the state is strictly the discharge of a function of government, to which, from reasons of public policy, no civil liability attaches. If, then, the state, by general law or by charter provision, delegates these duties to municipal corporations, which as a matter of administrative policy it commonly does, they, in so far as they act in the performance of them, act as the representatives of the state and in the discharge of purely governmental functions, the exercise of which interests and benefits not merely the citizens within their own limits, but as well the citizens of the state as a whole. Hence so far as responsibility for torts growing out of the performance of these duties is concerned, municipal corporations are entitled to, and are universally accorded by the courts, the same immunity from civil suit as the state itself enjoys, unless a liability is expressly declared by statute.

§ 190. **Illustrations of the Rule — Torts committed by Health Officials.** — Numerous decisions based upon such considerations are to be found in the books, wherein

municipal corporations have been held not to be liable at common law for the negligent or tortious acts of their officers or agents done while engaged in enforcing sanitary regulations intended to prevent the spread of contagious diseases, whereby such a disease was communicated to a private citizen¹ or to his family,² or whereby private property was injured³ or destroyed.⁴

And so it has been held that they were not liable for the negligence⁵ or the incompetence⁶ of a driver of a garbage wagon, or of other employees of the health department,⁷ in consequence of which an injury was occasioned to an individual.

§ 191. Illustrations of the Rule — Torts committed by Charity Officials.—In enforcing this general rule of immunity, as applied to the torts of corporate officers or

¹ *Barbour v. Ellsworth*, 67 Me. 294 (1876).

² *Ogg v. Lansing*, 35 Ia. 495 (1872).

In *Wyatt v. Rome*, 105 Ga. 312 (1898), (31 S. E. Rep. 188), the court decided that the defendant city was not liable to a citizen who sustained an injury on account of impure virus matter administered to him by corporate officers or agents in the enforcement of a valid ordinance requiring citizens and residents of the city to submit to vaccination.

³ *Mitchell v. Rockland*, 52 Me. 118 (1860), where the defendant city was held not responsible for damages done in the course of fumigating the plaintiff's ship by order of its health officers.

⁴ *Bamber v. Rochester*, 26 Hun (N. Y.), 587 (1882), where the city was held not liable for the destruction, by order of health officials, of rags alleged to be infectious and dangerous to health.

⁵ *Condict v. Jersey City*, 46 N. J. L. 157 (1884).

⁶ *Love v. Atlanta*, 95 Ga. 129 (1894), (22 S. E. Rep. 29).

⁷ *Richmond v. Long*, 17 Gratt. (Va.) 375 (1867), where the defendant city was held not to be liable for the negligence or misconduct of hospital officers or employees, in consequence of which the plaintiff's slave, who was a patient in the hospital, was lost. *Bryant v. St. Paul*, 33 Minn. 289 (1885), (23 N. W. Rep. 220), where the corporation was held not liable for the negligence of an employee of the Board of Health in leaving open a vault, into which the plaintiff fell and was injured.

agents committed while they were engaged in the discharge of the duties involved in the administration of public charities, the courts have held municipal corporations not to be responsible in a civil suit at common law for personal injuries occasioned by the unskilful treatment accorded to indigent and non-paying patients by a physician employed by them to treat such patients;¹ nor for the negligence of their officers or agents in the management of the property of the department of public charities, which resulted in an injury to the person² or to the property³ of a citizen.

§ 192. Illustrations of the Rule — Torts committed by School Officials. — The application of this general rule of exemption from liability to the tortious acts of school officers or agents has resulted in numbers of decisions holding municipal corporations not to be liable, in the absence of some statute expressly making them so, for personal injuries suffered by reason of defective conditions existing through the negligence of the agents or employees of the school board, in a school yard,⁴ or in a school building⁵

¹ *Sherbourne v. Yuba County*, 21 Cal. 113 (1862); *Summers v. Daviess County*, 103 Ind. 262 (1885), (2 N. E. Rep. 725); *Murtaugh v. St. Louis*, 44 Mo. 479 (1869).

² *Maxmilian v. Mayor, etc. of New York*, 62 N. Y. 160 (1875), where the city was held not liable for personal injuries occasioned by the driver of an ambulance in the employ of the Board of Charities, who so negligently managed the vehicle as to run over the plaintiff.

³ *Haight v. Mayor, etc. of New York*, 24 Fed. Rep. 93 (1885). In this case it was held that a libel to recover damages for a collision between the plaintiff's schooner and a steamboat owned by the defendant city, but in the exclusive use and control of its commissioners of charities and navigated by a pilot employed by them, could not be sustained, though the collision was solely through the fault of the pilot of the steamer.

⁴ *Donovan v. Board of Education*, 85 N. Y. 117 (1881); *Finch v. Board of Education*, 30 Oh. St. 37 (1876).

⁵ *Lane v. Woodbury Township*, 58 Ia. 462 (1882), (12 N. W. Rep.

or its heating apparatus.¹ Nor are they liable for injuries to adjoining property due to defective conditions suffered to exist upon school premises.²

478); *Hill v. Boston*, 122 Mass. 344 (1877); *Diehm v. Cincinnati*, 25 Oh. St. 305 (1874).

In *Lane v. Woodbury Township*, 58 Ia. 462 (1882), (12 N. W. Rep. 478), it appeared that the lightning-rods upon the school building had fallen into disrepair through the neglect of the school officers; that the building was struck by lightning, and the plaintiff, a pupil, was injured thereby. The defendant township was held not to be liable.

¹ *Wixon v. Newport*, 13 R. I. 454 (1881).

² *Ham v. Mayor, etc. of New York*, 70 N. Y. 459 (1877). In this case the facts were that, by reason of the negligent and improper construction and use of the water-closets in the school building, foul water ran on to the plaintiff's premises, which adjoined the school property, and injured his goods.

CHAPTER XII.

THE LIABILITY RELATIVE TO ORDINANCES.

§ 193. Where Injuries are due to a Failure to enact Ordinances.—The fact that the state has delegated authority to municipal corporations to establish by-laws and ordinances for the good government of their citizens, does not impose any absolute duty upon them. The exercise of the authority so conferred rests rather in the discretion of the officers of the legislative branch of the municipal government. It is for them to determine, according to their own judgment, what ordinances the public interests of the community, at the particular time and under the particular circumstances, require. It follows that however much general interest private citizens may have in securing a wise regulation of municipal affairs, they have no absolute right to any specific regulation.

Since in passing upon the question of the necessity or expediency of enacting any specific ordinance, the corporate authorities act in the discharge of the legislative function of the state, if any citizen is injured because such action resulted in a failure to enact a measure which might have prevented the damage, these facts give him no right of action at common law against the corporate body.¹

¹ Cain *v.* Syracuse, 95 N. Y. 83 (1884), where the injury was due to an omission to pass the necessary resolutions for the abatement of a private nuisance. Kelley *v.* Milwaukee, 18 Wis. 83 (1864), in which

§ 194. Where Injuries are due to a Failure to enforce Ordinances, or to the Improper Enforcement of them.—As municipal corporations represent the state in enacting the by-laws or ordinances deemed necessary for the proper regulation of affairs within their territory, so also in the matter of enforcing them do they represent the state. While the former was the exercise of the legislative power, the latter is the exercise of the executive power. In accordance with that general rule which protects corporate bodies while acting in the discharge of the functions of the state, the rule is that they are not responsible at common law for injuries to individuals due in any manner either to the entire omission of their officers to enforce the ordinances and regulations made and provided by the legislative branch of their government,¹ or to the case the injury was declared to be due to the failure to pass an ordinance to prevent swine from running at large.

In *Jones v. Williamsburg*, 97 Va. 722 (1900), (34 S. E. Rep. 883), the defendant city was held not to be liable to a person injured by being struck by a bicycle ridden on the sidewalk, because of its failure to pass an ordinance prohibiting such use of its sidewalks.

¹ *Levy v. Mayor, etc. of New York*, 1 Sandf. (N. Y.) 465 (1848), where the plaintiff's injury was alleged to be due to a failure of the defendant's officers to enforce an ordinance prohibiting swine from running at large. See also *Rivers v. Augusta*, 65 Ga. 376 (1880); and *Kelley v. Milwaukee*, 18 Wis. 83 (1861), cases involving a similar ordinance.

Ball v. Woodbine, 61 Ia. 83 (1883), (15 N. W. Rep. 846); *Boyland v. Mayor, etc. of New York*, 1 Sandf. (N. Y.) 27 (1847); *Robinson v. Greenville*, 42 Oh. St. 625 (1885); and *Norristown v. Fitzpatrick*, 94 Pa. St. 121 (1880), in which cases the injury was declared to be due to the defendant's failure to enforce an ordinance forbidding the firing of cannon, fire-crackers, and the like.

Lafayette v. Timberlake, 88 Ind. 330 (1882); *Pierce v. New Bedford*, 129 Mass. 534 (1880); and *Schultz v. Milwaukee*, 49 Wis. 254 (1880), (5 N. W. Rep. 342), cases where the omission to enforce ordinances to prevent coasting upon the public streets occasioned the plaintiff's injury.

Davis v. Montgomery, 51 Ala. 139 (1874); *Forsyth v. Atlanta*, 45

negligent or improper conduct of their officers in the enforcement of them.¹

§ 195. Where Injuries are due to the Suspension or Repeal of an Ordinance. — The power to determine the necessity or expediency of specific measures for the management of corporate affairs is not exhausted in its first exercise. It is in the nature of a continuing power, capable of being exercised again and again, as the passage of time and the change of circumstances may require. The suspension or repeal of an ordinance is, consequently, simply a further exercise of that legislative power which is vested in municipal corporations by the state. As the common law held them to be exempt from liability for the consequences of the first exercise of that power which resulted in the enactment of the ordinance, so it holds them to be free from responsibility for any injuries due to a further exercise of it which results in the suspension or repeal of the ordinance.²

Ga. 152 (1872). In these cases the plaintiff claimed that his damages were due to the defendant's omission to enforce ordinances the object of which was to guard against fire.

¹ *Wyatt v. Rome*, 105 Ga. 312 (1898), (31 S. E. Rep. 188), where it was decided that the city was not liable for any injury that might be sustained by a citizen on account of impure virus administered to him in the enforcement of a valid ordinance requiring citizens and residents of the city to submit to vaccination. *Odell v. Schroeder*, 58 Ill. 353 (1871), a case where the defendant town was held not liable for the illegal and unauthorized acts of its officers in enforcing an ordinance.

In *Worley v. Columbia*, 88 Mo. 106 (1885), the defendant was held not to be responsible for a trespass committed by its officers in the enforcement of a void ordinance.

Where the city let a stall in a market to the defendant and licensed him to sell meat, it was held to be no defence to an action for rent that the city officers had neglected to enforce an ordinance prohibiting unlicensed persons from selling. *Peck v. Austin*, 22 Tex. 261 (1858).

² *Wheeler v. Plymouth*, 116 Ind. 158 (1888), (18 N. E. Rep. 532); *Hill v. Charlotte*, 72 N. C. 55 (1875), cases where the defendant sus-

pended its ordinance prohibiting the firing of gunpowder, fire-crackers, and the like, within the city limits, and afterwards, while it was so suspended, the plaintiffs' buildings were set on fire and damaged or destroyed by the firing of such explosives. *Rivers v. Augusta*, 65 Ga. 376 (1880), where the plaintiff was injured by a cow running at large, at a time when the city ordinance against permitting cattle to run at large was suspended.

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